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IN THE

Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM,
K&L WINE MERCHANTS, BEVERAGES & MORE, INC.,
DAVID L. TAPP, RONALD L. PARRISH,
JEFFREY R. DAVIS,

Petitioners,

v.

JOHN T. STEEN, JR., GAIL MADDEN, JOSE CUEVAS, JR.,
ALLEN STEEN, GLAZER'S WHOLESALE DRUG CO., INC.,
REPUBLIC BEVERAGE CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 22, 2010

QUESTION PRESENTED

Whether, notwithstanding *Granholm v. Heald*, 544 U.S. 460 (2005), the Twenty-first Amendment overrides the Commerce Clause and allows States to discriminate against out-of-state businesses in the sale of alcoholic beverages.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Wine Country Gift Baskets.com is wholly owned by a privately held company, Houdini, Inc., and no publicly held corporation owns 10% or more of the latter's stock.

Petitioner K&L Wine Merchants is wholly owned by a privately held company, BBCK Enterprises, Inc., and no publicly held corporation owns 10% or more of the latter's stock.

Petitioner Beverages & More, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

For decades, the cornerstone of this Court's Commerce Clause jurisprudence has been the principle that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (internal quotation omitted). "This rule is essential to the foundations of the Union": if States were free to yield to the natural tendency to protect their own businesses from out-of-state competition, the Nation as a whole would experience "economic Balkanization" and "a proliferation of trade zones." *Id.* Thus, "State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity." *Id.* at 476 (internal quotation omitted).

In this case, however, the Fifth Circuit upheld a Texas law that facially discriminates between in-state and out-of-state businesses: in-state retailers may remotely sell and directly ship alcoholic beverages to in-state consumers, but out-of-state retailers may not. Thus, a liquor store in Pasadena, Texas, may take an order for a case of wine over the telephone and ship it by Federal Express to a household in Houston, but an identical store in Pasadena, California, may not. The Fifth Circuit did not identify any compelling justification for such differential treatment. Rather, the court held that the Twenty-first Amendment, which repealed Prohibition, categorically immunized the Texas law from Commerce Clause scrutiny.

That holding cannot be squared with this Court's landmark decision in *Granholm*, which confirmed that the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause. *Id.* at 486. In particular, the Amendment "restored to the States the powers they had" before Prohibition, but "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Id.* at 484-85. "Allowing States to discriminate against out-of-state wine invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 473 (internal quotation omitted).

The Fifth Circuit—echoing an earlier decision by the Second Circuit, *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009)—has now turned *Granholm* upside down. Rather than construing *Granholm* as a *prohibition of* discrimination, these courts have interpreted that decision as a *license for* discrimination. Under this view, the relevant constitutional analysis under *Granholm* starts and ends with the proposition that a three-tier system of alcohol distribution (which separates producers from wholesalers from retailers) is "unquestionably legitimate" under the Twenty-first Amendment. After deeming discrimination between in-state and out-of-state retailers inherent in a three-tier system, these courts held that the Twenty-first Amendment categorically insulates such discrimination from Commerce Clause scrutiny, and purported to distinguish *Granholm* as limited to forbidding discrimination against out-of-state *producers*, not out-of-state *retailers*.

Such a distinction has no basis in law or logic. *Granholm*'s teaching could scarcely be more clear: "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. There is no inconsistency whatsoever between a three-tier system, on the one hand, and direct shipping by out-of-state businesses (whether producers or retailers) on the other. *See* FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 7 (July 2003) (FTC Report), available at *http://www.ftc.gov/os/2003/07/winereport2.pdf* (last visited on November 18, 2010) ("Direct shipping refers to wineries *or retailers* shipping wine directly to consumers outside the three-tier system, usually to their home or work via a package delivery company ....") (emphasis added).

Granholm sought to end "an ongoing, low-level trade war" between States over the remote sale and direct shipping of wine and other alcoholic beverages. 544 U.S. at 473. But this case shows that the war rages on—the battlefield has simply shifted from producers to retailers. And this case, like *Arnold's Wines*, shows that the lower courts do not know how to interpret and apply *Granholm*. *See, e.g.*, *Arnold's Wines*, 571 F.3d at 192-93 (Calabresi, J., concurring) (asserting that current jurisprudence "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"). The time has come for this Court to clear up the confusion and end this festering interstate trade war for once and for all. Accordingly, this Court should grant the petition and reverse the decision below.

OPINIONS BELOW

The Fifth Circuit's initial opinion, subsequently withdrawn, is reported at 595 F.3d 249, and reprinted in the Appendix ("App.") at 1-25a. The Fifth Circuit's subsequent substitute opinion, issued upon denial of petitioners' initial petition for rehearing *en banc*, is reported at 612 F.3d 809, and reprinted at App. 26-52a. The Fifth Circuit's unreported order denying petitioners' subsequent petition for rehearing *en banc* is reprinted at App. 53-54a. The district court's opinion is reported at 530 F. Supp. 2d 848, and reprinted at App. 55-106a.

JURISDICTION

The Fifth Circuit denied a timely petition for rehearing *en banc* on August 24, 2010. App. 53a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause provides:

> The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

U.S. Const. art. I § 8 cl. 3.

The Twenty-first Amendment provides:

> **Section 1**. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> **Section 2**. The transportation or importation into any State, Territory, or possession of the United States for delivery or

> use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> **Section 3**. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. XXI.

The Texas Alcoholic Beverage Code provides in relevant part:

> It is the public policy of this state and a purpose of this section to require that, except as provided in Subsection (k) of this section or otherwise in this code, a permit or license may not be issued to a person who was not a citizen of this state for a one-year period preceding the date of the filing of the person's application for a license or permit.

Tex. Alco. Bev. Code § 6.03(a).

> It is also the public policy of this state and a purpose of this section to maintain and enforce the three-tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a "tied house" as described and prohibited in Section 102.01 of this code.

Tex. Alco. Bev. Code § 6.03(i).

> The holder of a package store permit or wine only package store permit issued for a location within a city or town or within two miles of the

> corporate limits of a city or town, who also holds a local cartage permit, may make deliveries of and collections for alcoholic beverages off the premises in areas where the sale of the beverages is legal. The permittee must travel by the most direct route and may make deliveries and collections only within the county or the city or town or within two miles of its corporate limits, and only in response to bona fide orders placed by the customer, either in person at the premises, in writing, by mail, or by telegraph or telephone. This section shall not be construed as preventing a holder of a package store permit or wine only package store permit from delivering alcoholic beverages to the holder of a carrier's permit for transportation to persons who have placed bona fide orders and who are located in an area that the holder of a package store permit or wine only package store permit, who also holds a local cartage permit, is authorized to directly deliver to under this section. The holder of a package store permit or wine only package store permit may also deliver alcoholic beverages to the holder of a carrier's permit for transportation outside of this state in response to bona fide orders placed by persons authorized to purchase the beverages.

Tex. Alco. Bev. Code § 22.03(a).

> The holder of a wine only package store permit may make deliveries to and collections from customers as provided in Section 22.03 of this code.

Tex. Alco. Bev. Code § 24.03.

> Any person who does not hold an out-of-state winery direct shipper's permit who sells and ships alcohol from outside of Texas to an ultimate consumer in Texas commits on first offense a Class B misdemeanor, on second offense a Class A misdemeanor, and on third offense a state jail felony.

Tex. Alco. Bev. Code § 54.12.

> In this section, "tied house" means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer ....

Tex. Alco. Bev. Code § 102.01(a).

> No person may import liquor into the state and deliver it to a person not authorized to import it.

Tex. Alco. Bev. Code § 107.05(a).

> Except as provided by Chapter 54, any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident under this section is in violation of this code.

Tex. Alco. Bev. Code § 107.07(f).

> No person who has not been a citizen of Texas for a period of one year immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code.

Tex. Alco. Bev. Code § 109.53.

STATEMENT OF THE CASE

A. Background

Like many other States, Texas has established a three-tier system governing the distribution of alcoholic beverages to prevent vertical integration by producers, wholesalers, and retailers. *See generally* Tex. Alco. Bev. Code § 6.03(i) ("It is ... the public policy of this state and a purpose of this section to maintain and enforce the three-tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a 'tied house' as described and prohibited in Section 102.01 of this code."); *id.* § 102.01 ("'[T]ied house' means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer ....."). As these provisions make clear, the key point of a three-tier system is to ensure separate ownership of alcohol producers, wholesalers, and retailers. *See* FTC Report 5-7.

Unlike many other States, Texas has long used its Alcoholic Beverage Code and three-tier system to discriminate against out-of-state businesses. In 1994, the Fifth Circuit invalidated the Code's durational residency and citizenship requirements for retailers, characterizing them as "parochial statutes" that "amount to simple economic protectionism." *Cooper v. McBeath*, 11 F.3d 547, 548 (5th Cir. 1994). In 2003, the Fifth Circuit invalidated the Code's provisions allowing sales and direct shipping by in-state, but not out-of-state,

wineries, *see Dickerson v. Bailey*, 336 F.3d 388, 409 (5th Cir. 2003), thereby foreshadowing this Court's subsequent decision in *Granholm*. And in 2007, a district court invalidated the Code's durational residency and citizenship requirements for wholesalers of alcoholic beverages, *Southern Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007)—a decision the State did not even appeal.

In the wake of *Dickerson*, Texas amended the Code to allow out-of-state *producers* of wine to remotely sell and directly ship to Texas consumers, but expressly prohibited out-of-state *retailers* of wines and other alcoholic beverages from doing the same. *See* Tex. Alco. Bev. Code § 54.12. Under the latter provision, it is a crime (indeed, after two offenses, a felony) for any out-of-state retailer to remotely sell and directly ship alcoholic beverages to *any* Texas consumers. *See id.* In sharp contrast, the Code allows in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to Texas consumers in the same county. *See id.* § 22.03(a); *see also id.* § 24.03.

B. Proceedings Below

Petitioners are out-of-state wine retailers who wish to remotely sell and directly ship wine to Texas consumers, and Texas consumers who wish to buy wine from such retailers. They brought this lawsuit in 2006 challenging the constitutionality of the Texas Alcoholic Beverage Code insofar as it discriminates between in-state and out-of-state retailers with respect to the remote sale and direct shipment of wine. The complaint sought both declaratory and injunctive relief from the official respondents here,

the members of the Texas Alcoholic Beverage Commission. Two in-state wholesalers, the private respondents here, thereafter intervened to defend the constitutionality of the challenged Code provisions.

The district court (Fitzwater, C.J., N.D. Tex.) granted petitioners' motion for summary judgment, holding that the provisions of the Texas Alcoholic Beverage Code that allow in-state, but not out-of-state, retailers to remotely sell and directly ship wine to Texas consumers violate the Commerce Clause. App. 77-91a. The court held that these provisions facially discriminate against the out-of-state retailers and that the State had failed to show that such discrimination advanced a legitimate state interest that could not be adequately served by reasonable nondiscriminatory alternatives. *See id.* The district court, however, gave petitioners no real remedy for that constitutional violation, holding that out-of-state retailers must purchase any wine remotely sold and directly shipped to Texas consumers from Texas wholesalers. App. 92-105a. Both sides appealed.

The Fifth Circuit reversed the district court's decision that the challenged provisions of the Texas Code violate the Commerce Clause. App. 1-25a. The appellate court held that this case is governed by the Twenty-first Amendment, not the Commerce Clause. According to the Fifth Circuit, the Twenty-first Amendment legitimizes the three-tier system, and discrimination between in-state and out-of-state retailers is an "inherent" part of that system, and thus cannot violate the Commerce Clause. App. 17-23a. Because the Fifth Circuit concluded that the

challenged provisions did not violate the Federal Constitution, the court did not reach the issue of remedy. App. 6a, 7a.

Petitioners sought rehearing *en banc*. Several months later, the panel denied the petition, but issued a revised opinion. App. 26-52a. The Fifth Circuit denied a subsequent petition for rehearing *en banc*, App. 53-54a, and this petition follows.

REASON FOR GRANTING THE WRIT

The Twenty-First Amendment Does Not Override The Commerce Clause And Allow States To Discriminate Against Out-Of-State Businesses In The Sale Of Alcoholic Beverages.

This petition presents the question whether this Court meant what it said in *Granholm*: the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause. 544 U.S. at 486. The lesson of *Granholm* is that the Twenty-first Amendment does not displace the rule that "the Commerce Clause prevent[s] States from discriminating against imported liquor." *Id.* at 476.

Here, however, the Fifth Circuit upheld a facially discriminatory state law without conducting *any analysis whatsoever* under the Commerce Clause. While acknowledging that "[t]he dormant Commerce Clause applies" to interstate commerce in alcoholic beverages, the court insisted that in this context the Clause "applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment." App. 47a.

But the court did not apply the Commerce Clause "differently" in this case; it did not apply the

Commerce Clause *at all*. The court sought to justify this approach by invoking *Granholm*'s observation that "the three-tier system is 'unquestionably legitimate.'" 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). That observation, the Fifth Circuit declared, means that "the foundation on which we build is that Texas may have a three-tier system." App. 44a; *see also* App. 49a ("*Granholm* told us that the three tiers are legitimate under the Twenty-first Amendment."); App. 44a ("Th[e] [three-tier] system has been given constitutional approval. The discrimination that would be questionable ... is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that."); *id.* (characterizing this "legitimizing" of the three-tier system as a "caveat" to the principle that the Commerce Clause prevents States from discriminating against out-of-state businesses).

Having thus made the legitimacy of the three-tier system the starting point for the inquiry, the Fifth Circuit proceeded to declare—without analysis—that discrimination between in-state and out-of-state retailers of alcoholic beverages is "an inherent aspect" of such a system and thus necessarily constitutional. App. 49a; *see also* App. 48a ("When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that ... retailers may be required to be within the State."); App. 47a ("Because of *Granholm* and its approval of a three-tier system, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers

from doing the same."); App. 50a ("[P]hysical location ... is a critical component of the three-tier system."); *see also Arnold's Wines*, 571 F.3d at 190 (characterizing challenge to New York law that discriminated against out-of-state retailers as "a frontal attack on the constitutionality of the three-tier system itself"); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (opinion of Niemeyer, J.) (same); *but see id.* at 361 (Traxler, J., concurring in part and concurring in the judgment) (refusing to join this portion of Judge Niemeyer's opinion); *id.* at 361-63 (Goodwin, J., dissenting) (rejecting this portion of Judge Niemeyer's opinion).

The assumption that discrimination against out-of-state retailers of alcoholic beverages is "inherent" in a three-tier system is baseless. There is no reason why a State with a three-tier system must limit retail sales of alcoholic beverages to in-state businesses. To the contrary, many States with three-tier systems have adopted legislation that specifically allows out-of-state retailers to remotely sell and directly ship wine and/or other alcoholic beverages on the same terms as in-state retailers. *See, e.g.*, Cal. Bus. & Prof. Code § 23661.2; Idaho Code § 23-1309A; La. Rev. Stat. § 26:359; Mo. Rev. Stat. § 311.462; N.H. Rev. Stat. § 178:27; N.M. Stat. § 60-7A-3; Or. Rev. Stat. § 471.282; Va. Code § 4.1-209.1; W. Va. Code § 60-8-6; Wyo. Stat. § 12-2-204. Indeed, a Task Force of the National Conference of State Legislatures has endorsed a Model Direct Shipping Bill, cited with approval in *Granholm*, *see* 544 U.S. at 491-92, that establishes a template for state statutes allowing nondiscriminatory remote sales and direct shipping by out-of-state retailers. These statutes and the Model Bill refute the

assumption of the Fifth and Second Circuits that discrimination between in-state and out-of-state retailers is "inherent" in a three-tier system, App. 49a, so that a challenge to such discrimination is "a frontal attack on the constitutionality of the three-tier system itself," *Arnold's Wines*, 571 F.3d at 190.

In other words, a three-tier system can accommodate remote sales and direct shipping by out-of-state alcohol *retailers* just as easily as remote sales and direct shipping by out-of-state alcohol *producers*. A three-tier system, after all, focuses on the *ownership* of businesses, not the *location* of businesses. As the Texas Alcoholic Beverage Code itself makes clear, the system seeks to prevent a "tied house," *i.e.*, "any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels." Tex. Alco. Bev. Code § 102.01; *see also id.* § 6.03(i). There is no reason to suppose that this Court was referring to anything more than such separation of ownership by noting in *Granholm* that a three-tier system is "unquestionably legitimate." 544 U.S. at 489 (internal quotation omitted); *see also id.* at 488 ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and *how to structure the liquor distribution system*.") (emphasis added; internal quotation omitted). Indeed, *Granholm* drew its definition of a three-tier system from an FTC report that endorsed direct shipment of wine by both out-of-state wineries *and retailers* without suggesting any inconsistency with a three-tier system. *See id.* at 466 (citing FTC Report 5-7).

Thus, it does not follow that a three-tier system requires differential treatment of out-of-state retailers. To the contrary, such differential treatment necessarily conflicts with the Commerce Clause, which creates a single *national* market and renders state lines invisible insofar as interstate commerce is concerned. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). Or, as *Granholm* put it, "[t]he mere fact of nonresidence should not foreclose a [business] in one State from access to markets in other States." 544 U.S. at 472.

To interpret *Granholm*'s approval of the three-tier system as a blessing of differential treatment of in-state and out-of-state businesses is to attribute acute schizophrenia to that decision, which could hardly have been more emphatic in its condemnation of such differential treatment. *See id.* ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.") (internal quotation omitted); *id.* at 475 ("States cannot require an out-of-state firm to become a resident in order to compete on equal terms.") (internal quotation omitted).

To hold that the three-tier system trumps the Commerce Clause, moreover, is to elevate that system to quasi-constitutional status and open a new frontier of federal constitutional law: the definition of a "three-tier system." According to the Fifth Circuit, *Granholm* held that the Twenty-first Amendment allows each tier of the system "to do what producers,

wholesalers, and retailers do." App. 45a. But that requires a court to determine the scope of these various activities as a matter of federal constitutional law. Indeed, the Fifth Circuit explained that its task here was to "analyz[e] 'retailing' for Twenty-first Amendment purposes." App. 46a.

The Fifth Circuit, however, quickly "pull[ed] back from any effort to define the reach of a traditional three-tier retailer" as a matter of federal constitutional law. App. 46a. Instead, the court simply held that "what Texas has allowed here" is not "so substantially different from what retailing must include as not to be third-tier retailing at all." *Id.* The court characterized "over-the-counter sales" by in-state retailers as "*Granholm*-approved retailing," and asserted that the remote sales and direct shipping authorized by Texas law are sufficiently similar to such sales to fall within the scope of constitutionally approved "retailing." App. 47a. Thus, the court declared, the Texas laws at issue here pass federal constitutional muster because "[r]etailers are acting as retailers and making what conceptually are local deliveries." *Id.*; *see also* App. 48a ("We view local deliveries as a constitutionally benign incident of an acceptable three-tier system."). The court warned that "[a] State's right to authorize a variety of retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless," App. 49a, but offered no guidance as to the scope of constitutionally sanctioned "retailing."

The Fifth Circuit's rapid descent into this quagmire underscores the fundamental infirmity of its approach. The three-tier system is a creature of

state law, not federal constitutional law. This Court's observation in *Granholm* that a three-tier system is "unquestionably legitimate," 544 U.S. at 489 (internal quotation omitted), was not an invitation for courts to invent a federal constitutional definition of a "three-tier system." There is no such thing as "'retailing' for Twenty-first Amendment purposes," App. 46a, because the Twenty-first Amendment does not refer to retailing—or, for that matter, to a three-tier system.

By starting and ending the federal constitutional analysis by reference to the legitimacy of the three-tier system, the Fifth Circuit (like the Second Circuit before it, *see Arnold's Wines*, 571 F.3d at 190-92), has condemned the district courts in those circuits to the impossible task of defining a legitimate three-tier system as a matter of federal constitutional law. *Cf. id.* at 192 (Calabresi, J., concurring) (noting that current jurisprudence "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"); *id.* at 201 ("[W]hile the general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation, it is not for our court to say how far or how fast we should move along that vector.").

What makes this brave new world of Twenty-first Amendment jurisprudence particularly troubling is that *Granholm* specifically *rejected* the proposition that the Twenty-first Amendment "saves" any discrimination against interstate commerce otherwise prohibited by the Commerce Clause. *See* 544 U.S. at 476-89. As *Granholm* explained, the States were *never* authorized to discriminate against interstate commerce with respect to alcoholic

beverages, and the Twenty-first Amendment did not create any new right to do so. *See id.* at 477-83 (citing, *inter alia*, *Scott v. Donald*, 165 U.S. 58 (1897); *Walling v. Michigan*, 116 U.S. 446 (1886); *Tiernan v. Rinker*, 102 U.S. 123 (1880)). "The [Twenty-first] Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Granholm*, 544 U.S. at 484-85. Thus, notwithstanding the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487.

There can be no doubt that the provisions of the Texas Alcoholic Beverage Code at issue here violate that principle. As noted above, those provisions allow in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to consumers anywhere within the same county, *see* Tex. Alco. Bev. Code §§ 22.03(a), 24.03, but prohibit out-of-state retailers from remotely selling and directly shipping such beverages *anywhere* in Texas, *see id.* §§ 54.12, 107.07(f).

The Fifth Circuit asserted that out-of-state retailers are not "similarly situated to Texas retailers and cannot make a logical argument of discrimination" because they are not present in any particular Texas county. App. 47a. As this Court has long held, however, a State "may not avoid the strictures of the Commerce Clause" by crafting economically protectionist legislation on a local or county-wide, rather than State-wide, basis. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of*

Natural Res., 504 U.S. 353, 361 (1992); *see also Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 & n.4 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). As the district court recognized, out-of-state retailers are obviously in a worse position than in-state retailers because they cannot remotely sell and directly ship wine or other alcoholic beverages to *any* county in Texas. App. 81-86a & n.17. Indeed, the Texas Solicitor General acknowledged below that "the geographical limits" in the Texas Alcoholic Beverage Code are "irrelevant" for federal constitutional purposes, App. 46a, and the result in this case would be the same if in-state retailers could remotely sell and directly ship *anywhere* in the State.

The Fifth Circuit thus missed the point by characterizing remote sales and direct shipping as mere "consumer-friendly practices" incidental to a retailer's in-state location, like carrying a customer's groceries from a store to a car. App. 49a. The key point here, as the district court recognized, is that the challenged provisions of the Texas Alcoholic Beverage Code do not involve over-the-counter transactions, but instead remote sales and direct shipping. App. 85-86a. But for those provisions, out-of-state retailers are just as capable as in-state retailers of carrying out such remote sales and direct shipping. *Id.* While a State need not allow the remote sale and direct shipping of alcoholic beverages at all, once it does so, it may not discriminate between in-state and out-of-state businesses. *See Granholm*, 544 U.S. at 488-89, 493; *see also* App. 85-86a.

The remote sale and direct shipment of wine and other alcoholic beverages is not only pure interstate

commerce, but also—as this Court underscored in *Granholm*—"an emerging and significant business." 544 U.S. at 467 (citing FTC Report 7, which does not distinguish between remote sales and direct shipping by producers and retailers). The explosive growth of the Internet in recent years offers consumers of wine and other alcoholic beverages (like any other consumer products) enhanced price competition and greater selection. *See* FTC Report 1, 16-22. As *Granholm* noted, however, "'[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.'" 544 U.S. at 468 (quoting FTC Report 3).

Absent intervention by this Court, a substantial portion of the Nation—including the States of Texas and New York—will be prevented from reaping the benefits of the Commerce Clause as applied in *Granholm*. *See* 544 U.S. at 472-73. This case and *Arnold's Wines* have erected a distinction, hitherto unknown in this Court's jurisprudence, between discrimination against out-of-state *producers* (impermissible under *Granholm*) and discrimination against out-of-state *retailers* (allegedly permissible under the three-tier system). *See* App. 44-50a; *Arnold's Wines*, 571 F.3d at 190-92. That alleged distinction cannot be allowed to stand.

For all intents and purposes, after all, a producer engaged in remote sales and direct shipping (as in *Granholm*) is engaged in retailing. *See, e.g.*, FTC Report 7 (defining "direct shipping" as shipping by out-of-state "wineries *or retailers*") (emphasis added). If the three-tier system can accommodate remote sales and direct shipping by out-of-state producers, there is no reason why that system cannot

accommodate precisely the same activity by out-of-state retailers. It is high time for this Court to clear up the manifest confusion in this area, *see, e.g.*, *Arnold's Wines*, 571 F.3d at 193 (Calabresi, J., concurring), and to bring a definitive end to the ongoing interstate trade war over the remote sale and direct shipment of wine.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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FILED: January 26, 2010
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10146

WINE COUNTRY GIFT BASKETS.COM; K&L WINE MERCHANTS; BEVERAGES & MORE INC; DAVID L TAPP; RONALD L PARRISH; JEFFREY R DAVIS

Plaintiffs – Appellants-Cross-Appellees

v.

JOHN T. STEEN, JR., Commissioner of the Texas Alcoholic Beverage Commission; GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission; JOSE CUEVAS, JR., Commissioner of the Texas Alcoholic Beverage Commission

Defendants-Appellees-Cross-Appellants

ALLEN STEEN, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Defendant – Appellee-Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY, INC; REPUBLIC BEVERAGE COMPANY

Intervenor Defendants – Appellees-Cross-Appellants

Appeal from the United States District Court for the Northern District of Texas

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

This case primarily concerns a Texas law that allows alcohol retailers to ship to the door of their local consumers. Out-of-Texas wine retailers claim that the dormant Commerce Clause requires they be given a supposedly reciprocal right to make direct shipments to any Texas consumer. The district court partly accepted their argument. We hold that the statutes do not run afoul of the dormant Commerce Clause. We VACATE and REMAND for entry of judgment.

FACTUAL AND LEGAL BACKGROUND

There were several parties to this case, but they can be grouped easily. One plaintiff, Siesta Village Market LLC, who is a Florida wine retailer, has dismissed its appeal. Another, Wine Country Gift Baskets.com, is a California wine retailer. Wine Country's appellate brief describes the plaintiffs, present and past, as "a group of out-of-state wine retailers and Texas wine consumers." We refer to the plaintiffs collectively as "Wine Country."

Suit was filed by Siesta Village and a few Texas wine consumers on March 31, 2006, in the Dallas Division of the U.S. District Court for the Northern District of Texas. A nearly identical suit was filed by Wine Country, two other California retailers, and a few named Texas consumers in the Fort Worth Division. The suits were consolidated in the Dallas Division. The wine retailers located outside of Texas wish to ship wine directly to Texas consumers.

Defendants are Allen Steen, the Administrator of the Texas Alcoholic Beverage Commission, and three Commission members sued in their official

capacities. They enforce the Texas Alcoholic Beverage Code ("TABC"). We will refer to the various Defendants as "the State" or "Texas."

Two Texas alcoholic beverage wholesalers intervened. These companies are Glazer Wholesale Drug Company, Inc., and Republic Beverage Co.

As do many other States, Texas has a three-tier system for regulating sales of alcoholic beverages. The first tier is the producer, who must sell its product to the second-tier, which is a State-licensed wholesaler. The wholesaler distributes the product to the third tier, consisting of State-licensed retailers. Consumers purchase from the retailers. "[S]trict separation between the manufacturing, wholesaling, and retailing levels" of the alcoholic beverage industry must be maintained. TEX. ALCO. BEV. CODE § 6.03(i).

The challenged Texas laws fall into three principal categories. Almost all the relevant provisions apply to alcohol generally, though the complaint is from companies whose commercial interest is solely in wine.

First, some laws allow individuals to bring alcoholic beverages into Texas for their own use, known as a "personal import exception," but limit the quantity. The district court held that this direct-purchase restriction was unconstitutional in part. "Texas cannot prohibit consumers from purchasing wine from out-of-state retailers who comply with the Code and TABC regulations," the district court held. *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 868 (N.D. Tex. 2008). It ordered Texas to allow out-of-state retailers to receive Texas-issued retailer permits. Therefore, any consumer who bought wine

from an out-of-state holder of a Texas permit would not be subject to the quantity limit when entering the State with the beverages, though the limit for importing would apply to the same person's excessive purchases from out-of-state retailers that did not have Texas permits.

Second, and at the heart of this case, some of the laws allow in-state retailers to deliver alcoholic beverages to their customers within designated local areas, but forbid out-of-state retailers from delivering or shipping alcoholic beverages to customers anywhere in Texas.[1] Retailers may use common carriers licensed under the TABC, which include such companies as Federal Express. Just before summary judgment motions were filed in the consolidated suits, the Texas legislature amended the prior law which had allowed holders of package store permits or wine-only package store permits to ship their beverages statewide. TEX. ALCO. BEV. CODE § 22.03 (Vernon 2006) (amended Sept. 1, 2007). The amendment drew in the boundaries of the area of permissible shipment from the entire State to basically the county in which the retailer has a store. *Id.* §§ 22.03 & 24.03 (Vernon 2009). The district court held that the statutes discriminated against Wine Country and granted relief.

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[1] Although the statutes create some special permits for retailers selling only wine, the statutes allowing local delivery apply to retailers selling only wine and also to full-service package store permit holders. TEX. ALCO. BEV. CODE §§ 22.03(a); 24.03.

Third, the suit challenged requirements that the holders of TABC retailer permits have been Texas citizens for one year. The decision in an earlier case declared those provisions unconstitutional insofar as they applied to wholesalers. *S. Wine & Spirits of Tex. v. Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007). The district court in the present case declared the requirements unconstitutional as applied to retailers. The State does not appeal the voiding of the requirement and advised the district court that it will not enforce the citizenship rule.

The parties agreed on a preliminary injunction blocking enforcement of certain provisions for the duration of the lawsuit. On summary judgment, the district court declared twenty-three TABC provisions to be unconstitutional. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 873.

The district court did not, however, provide the remedy Wine Country wanted. The court decided that other provisions of the TABC, though clearly regulating only in-state retailers, should be applied to out-of-state retailers. Thus, Wine Country had a right to make direct shipments to Texas consumers, but it was required to obtain a Texas retailer permit and purchase all wine shipped to Texas consumers from Texas-licensed wholesalers. Such a "victory" was, if not pyrrhic, apparently of no benefit.[2]

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[2] The Second Circuit found it operationally absurd for out-of-state retailers to purchase inventory from in-state wholesalers, have it delivered to the retailers in some fashion, then shipped back to in-state consumers. *Arnold's Wines, Inc.*

Wine Country's dissatisfaction is evident from the fact it was the first to appeal, thereby becoming the Appellant despite the general success of its arguments. It claimed error in the remedy. The State cross-appealed to argue that its statutes do not violate the dormant Commerce Clause. Siesta Village, the named plaintiff in one of the two consolidated cases, initially was an Appellant but has since dismissed its appeal.

DISCUSSION

The grant of a motion for summary judgment is reviewed *de novo*. *Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 96 (5th Cir. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2).

This appeal almost exclusively concerns questions of law.

Wine Country convinced the district court that numerous TABC provisions violated the dormant Commerce Clause. Wine Country's arguments as the Appellant center on the remedy imposed by the district court. Because we set aside the invalidation of the statutory provisions, issues about the remedial relief implementing the invalidation become moot. We thus do not discuss Wine Country's arguments on the remedy.

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v. Boyle, 571 F.3d 185, 192 n.3 (2d Cir. 2009). Wine Country also found the requirement to be dispiriting.

The State of Texas as Cross-Appellant does not contest the district court's invalidation of the requirement that retailers establish Texas residency. That part of the judgment was not included in any notice of appeal and therefore has not been brought to us for reversal or affirmance.

Texas vigorously does contest the holding that the dormant Commerce Clause interfered with what Texas considers to be a right granted by the Twenty-first Amendment to favor in-state retailers in some respects.

Texas also argues that the direct shipping laws are justified by legitimate state interests. It alleges valid local public interests exist and the law has only incidental effects on interstate commerce. Its policy justifications include the State's need to access retail sites for inspection and enforcement, which can uncover illegal activities—specifically regarding alcohol or more generally for money laundering—and the State's goals of promoting temperance, insuring tax collections, and assuring the separation between the three tiers. We do not reach the policy justifications, as our reversal is for other reasons.

The last section in the Texas brief explains its embrace of the remedy that Wine Country rejects. There is no need to review those arguments.

We discuss only the cross-appeal arguments presented by Texas. First, we will examine closely the United States Supreme Court opinion that spoke strongly and supportively about the three-tier system for distribution of alcohol. We then look at what three subsequent opinions from other courts have said about it. We then briefly review the

district court's decision, and finally we apply our analysis to it.

A. The three-tier system and Granholm

Intoxicating liquor is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant.

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. XXI, § 2. The goals of "promoting temperance, ensuring orderly market conditions, and raising revenue" are met through regulation of the production and distribution of alcoholic beverages. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). The understanding of a State's power under the Twenty-first Amendment may have changed since the 1933 ratification, but we need not review seventy-five years of history. Instead, we rely primarily on the latest Supreme Court explanation.

The basic point Texas makes on appeal is that the three-tier system allows certain kinds of distinctions and particularly allows distinctions between in-state and out-of-state retailers. Further, allowing Texas-licensed retailers to make their sales in certain ways, namely, by delivery, and prohibiting out-of-state retailers from doing anything at all, is said to be authorized by controlling interpretations of the Twenty-first Amendment.

We start where Texas urges us to start, and where the district court did, by examining the most

recent Supreme Court discussion of the interplay between a State's authority to regulate alcohol and the dormant Commerce Clause. *See Granholm v. Heald*, 544 U.S. 460 (2005). The Court reaffirmed the principle that, despite what might appear to be absolute authority granted to States by the Twenty-first Amendment to regulate alcohol, the anti-discrimination principles of the dormant Commerce Clause nonetheless place some restrictions on the States.

The Court said that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 472 (quoting *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994)). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The *Granholm* Court invalidated two States' "direct shipping" laws allowing in-state wineries to ship wine they produced directly to consumers, but barring out-of-state wineries from doing the same. It found the "discriminatory character" of Michigan's prohibition "obvious," as that State's laws prohibited any shipment from out-of-state wineries, while allowing in-state wineries to ship after obtaining a permit. *Id.* at 473. New York's scheme was more complicated, allowing out-of-state wineries to ship to in-state consumers if the wineries established a physical presence in the State and became part of New York's three-tier distribution system. The

Court nonetheless found New York's rules discriminatory, noting that the rules clearly gave "preferential terms" to in-state wineries, which qualified for a simpler permit, did not have to participate in the three-tier system, and could ship wine directly from the site of its production. *Id.* at 474. Both States' laws, then, dealt with producers.

At least as to producers, the Court held that the "Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers." *Id.* at 486.

Once finding the laws discriminatory, the Court examined whether they might be saved by a tenet of the dormant Commerce Clause that exempts laws that "'advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). Obtaining such an exemption requires the "clearest showing" that the law is the only adequate means of serving the State's legitimate purpose. *Id.* at 490 (quoting *C&A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 393 (1994)). The States claimed two purposes—prevention of underage drinking and the need for taxes. *Id.* at 489. The Court found that neither had sufficient evidentiary support to save those States' laws. *Id.* at 490-92. We do not discuss this point because we determine that the Texas provisions are constitutional and do not need to be saved.

A decision by this court foreshadowed *Granholm*. In it, we struck down Texas laws that allowed Texas wineries to ship directly to consumers and thus

bypass going first to a wholesaler, but these laws prohibited out-of-state wineries from doing the same. *Dickerson v. Bailey*, 336 F.3d 388, 406-07 (5th Cir. 2003). The Texas legislature responded to *Dickerson* by authorizing wineries wherever located to ship directly to Texas consumers once they were issued the appropriate permit. TEX. ALCO. BEV. CODE §§ 54.01-.12.

We disagree with Wine Country that *Dickerson* answers today's questions. That precedent, as did *Granholm*, concerned wineries, *i.e.*, the producers of the product traveling in commerce. The producers in a three-tier system often are not located in the State in which the sales occur. The traditional three-tier system, seen as one that funnels the product, *Granholm*, 544 U.S. at 489, has an opening at the top available to all. The wholesalers and retailers, though, are often required by a State's law to be within that State. The distinction is seen in Texas law. It allows wineries themselves, located for example in California or Florida as are the retailer plaintiffs, to ship directly to Texas consumers.

Texas argues that the following language in *Granholm* certifies the constitutionality of the three-tier system that most States use, and is the lens through which the concept of discrimination needs to be seen:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over

> whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. at 432; *see also id.* at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers.

Id. at 488-89 (citations reformatted). That language may be *dicta*. If so, it is compelling *dicta*. What we make of that language, and its ability to protect these Texas statutes from Wine Country's dormant Commerce Clause arguments, is the next part of our analysis.

B. Other Courts' Granholm *analysis*

Granholm dealt specifically with state laws treating in-state and out-of-state producers of alcohol differently. This present appeal involves retailers. Since *Granholm*, other decisions from outside this Circuit have addressed that precedent's applicability to retailers who wish to ship wine into other States. We will discuss the three that are the most relevant.[3]

In the earliest decision, some Virginia consumers and a few out-of-state wineries challenged a Virginia statute that limited the amount of alcohol that consumers could personally carry into the State for their own use. *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006). The plaintiffs' theory was that the provision was unconstitutional because consumers could purchase an unlimited amount of wine from in-state sources but only limited amounts out-of-state for their personal importation into Virginia.

The opinion for the court held that plaintiffs' effort to compare in-state retailers to out-of-state retailers and then allege they were treated differently was fundamentally a challenge to the three-tier system itself. *Brooks*, 462 F.3d at 352 (Niemeyer, J.).[4] Because the Supreme Court had

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[3] A fourth decision analyzing *Granholm* was recently released, but we find nothing in it to affect our reasoning. *Family Winemakers of Cal. v. Jenkins*, No. 09-1169, 2010 WL 118387, at *5-15 (1st Cir. Jan. 14, 2010) (state law granting distribution rights to "small" wineries was held to discriminate in favor of in-state wineries, all of whom were "small").

[4] Judge Niemeyer wrote for the court, but a second judge concurred only in the judgment with respect to this part of the

described the three-tier system as "unquestionably legitimate," the court held the Virginia statutes to be constitutionally sound. *Id.* (quoting *Granholm*, 511 U.S. at 489).

In another decision, there were challenges to New York statutes that are analogous to those here. New York law permitted an in-state alcoholic beverage retailer to deliver directly to consumers' residences in New York, using the retailer's vehicles or by using vehicles of a transportation company licensed by the State's liquor authority; out-of-state retailers did not have comparable rights. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir. 2009).

The Second Circuit started with a recognition that the Twenty-first Amendment does not authorize all alcohol regulation. Any discrimination between in-state and out-of-state alcohol products or producers must reasonably further a legitimate state interest "that cannot adequately be served by reasonable nondiscriminatory alternatives." *Id.* at 189 (citation omitted). The court's focus on "products or producers" is the central debate: how much further, if at all, beyond products and producers do the anti-discrimination principles go?

The Second Circuit held products and producers are the limit. It described plaintiffs' arguments as simplistic analogies to the *Granholm*-identified discrimination. A State's making distinctions among in-state and out-of-state retailers, and even requiring

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opinion, while the third judge on the panel dissented from that part. This reasoning presumably has limited precedential effect in that Circuit.

wholesalers and retailers to be present in and licensed by New York, were fundamental components of the three-tier system authorized in *Granholm*. *Id.* at 190.

The court concluded that the New York laws permitting only in-state retailers to ship directly to consumers were in "stark contrast" to the laws struck down in *Granholm*, which "created specific exceptions to the states' three-tier systems favoring in-state producers." *Id.* at 191. It found that the production-related discrimination involved in *Granholm* "was exactly the type of economic protectionist policy the Commerce Clause sought to forestall, and where the *Granholm* Court drew the line." *Id.*

The line drawn by the court was between the broad state powers under the Twenty-first Amendment "to regulate the transportation, sale, and use of alcohol within their borders," and any "attempts to discriminate in favor of local products and producers." *Id.* It held New York's laws were evenhanded in their control of "importation and distribution of liquor within the state," and that made the dormant Commerce Clause all but irrelevant. *Id.* at 192.

In the third case, the court considered a Michigan law authorizing some in-state retailers to ship wine directly to consumers, while out-of-state retailers without a physical presence in Michigan could not. *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037-38 (E.D. Mich. 2008). The Michigan court limited the effect of the Supreme Court's *Granholm* decision: "While the [*Granholm v.*] *Heald* court did state that the three-tier system was an appropriate

use of state power, it did not approve of a system that discriminates against out-of-state interests." *Id.* at 1039. The court found that "regulations creat[ing] an extra burden on out-of-state wine retailers" were not saved by the Twenty-first Amendment. *Id.* The court also held it to be insufficient that out-of-state retailers could comply with Michigan law by establishing a location in the State. The "prohibitive" expense of opening physical stores in multiple States gave a clear advantage to in-state retailers. *Id.* at 1040 (citing *Granholm*, 544 U.S. at 474-75). Accordingly, the court struck down the Michigan laws. [5]

C. The District Court's Interpretation

The district court here considered the Texas "Personal Import Exception," which authorizes individuals to import alcohol for their own use. One section prohibits importation unless authorized. TEX. ALCO. BEV. CODE §107.05. That section is then made inapplicable to Texas residents who import for personal use not more than one quart of liquor, one gallon of wine, or twenty-four twelve-ounce bottles of beer. *Id.* § 107.07. There is no direct limit on how much can be purchased, only on how much can be imported.

These provisions were held by the district court to discriminate against out-of-state retailers because they "prohibit customers from purchasing wine from

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[5] An appeal to the Sixth Circuit was apparently mooted by an intervening change in the Michigan statutes being challenged.

out-of-state retailers" in unlimited quantities. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 868. The remedy was to allow out-of-state retailers to apply for Texas retail permits, even without the retailers' opening a location in the State. Any retailer with a Texas permit and making sales at locations outside of Texas could not be limited in sales volumes when those limits do not apply to Texas permit holders making sales inside Texas.

The district court also held that the Texas local shipping rights were discriminatory. The court held the relevant question to be whether there was discrimination "with respect to access to *in-state markets*," and there could be no exception for *de minimis* levels of discrimination. *Id.* at 864 (emphasis in original). The disability imposed on out-of-state retailers was not a "mere practical consequence" of location, as it might be if Texas permitted only over-the-counter sales of alcohol. Since Texas allowed in-state retailers to ship alcohol, there was no practical reason why out-of-state retailers could not also. *Id.* at 865-66. Shipping was the key, because shipping was as easily done from outside the State as from within.

Having found the Texas laws discriminatory, the court turned to the question of whether the State could show legitimate local purposes, not obtainable by nondiscriminatory alternatives, to justify the discrimination. We do not ultimately reach that analysis, so we do not summarize it here.

D. Dormant Commerce Clause Analysis

We first analyze the provisions that allow an in-state retailer to deliver within its county but bars an out-of-state retailer from shipping into Texas. Texas

argues that distinguishing between retailers in this way is a fundamental part of the constitutional three-tier system, which is "unquestionably legitimate." *Granholm*, 544 U.S. at 488-89.

To the contrary, Wine Country focuses on the *Granholm* prohibition on a state's liquor laws discriminating against out-of-state interests. Wine Country acknowledges that the Court limited its holding to discrimination benefitting alcohol on the basis of its in-state production status, but Wine Country argues that makes sense as that was the *Granholm* dispute. Texas argues the *Granholm* failure to mention retailers was significant, as distinctions favoring in-state retailers are inherently part of the three-tier system.

We first note what is not in issue. The discrimination that *Granholm* invalidated was a State's allowing its wineries to ship directly to consumers but prohibiting out-of-state wineries from doing so. Texas grants in-state and out-of-state wineries the same rights. TEX. ALCO. BEV. CODE §§ 54.01-54.12.

Such discrimination—among producers—is not the question today. When analyzing what else is invalid under the Supreme Court's *Granholm* reasoning, we find direction in a source for some of the Court's language. The Court quoted a 1986 precedent that "a comprehensive system for the distribution of liquor within [North Dakota's] borders" was "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1986)). North Dakota employed a three-tier system similar to that in Texas, in which producers sell to state-licensed

wholesalers, who sell to state-licensed retailers. *North Dakota,* 495 U.S. at 428. That sort of system has been given constitutional approval. The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that. The legitimizing is thus a caveat to the statement that the Commerce Clause is violated if state law authorizes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotation marks and citation omitted).

Therefore, the foundation on which we build is that Texas may have a three-tier system. That system authorizes retailers with locations within the State to acquire Texas permits if they meet certain eligibility requirements. Those retailers must purchase their alcoholic beverages from Texas-licensed wholesalers, who in turn purchase from producers. Each tier is authorized by Texas law and approved by the Twenty-first Amendment—so says *Granholm*—to do what producers, wholesalers, and retailers do.[6]

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[6] Wine Country at oral argument emphasized a provision of Texas law allowing Texas retailers to receive direct shipments from Texas wineries, bypassing the wholesaler tier. *See* TEX. ALCO. BEV. CODE § 110.053. This provision is not on the list of those enjoined by the district court and is not a subject of this appeal. *Siesta Vill Mkt.*, 530 F. Supp. 2d at 851.

Wine Country argues that the three tiers have tumbled because Texas has permitted retailers to make home deliveries within a confined range. At least in part, this must be an argument that Texas retailers are being allowed to act in ways that are unacceptable for retailers in a constitutionally sound system. The defect is one of discrimination: Texas retailers are doing what a retailer in California or Florida physically and practically can do, which is to use a licensed shipper to deliver to a Texas consumer, but legally cannot do.

To address the argument, it would be useful to know what specific actions allegedly caused the retailers to stop being *Granholm*-approved, traditional third-tier retailers. If Texas allowed a retailer to carry the beverages to a customer's vehicle parked in its lot, or across the street, would that be a problem? If a retailer's own delivery trucks traveled to the customer, is that discrimination? Does discrimination not begin until a retailer uses a licensed shipper? Relevant to the answer, Texas has not defended on the basis that retailers are just permitted to serve their usual local markets in enhanced, customer-friendly ways. Indeed, at oral argument, the Texas Solicitor General said that the geographical limits to local deliveries were irrelevant. The prior state-wide delivery version of the provision would be constitutional under that argument. We need not and do not reach the broader definitional issue.

In analyzing "retailing" for Twenty-first Amendment purposes, we find a useful warning in concurring Judge Calabresi's observations in *Arnold's Wines*. He found a tension between the

original (likely) meaning of the Twenty-first Amendment and the current interpretation, a change largely the result of Supreme Court reaction to the changing economic and social world since the adoption of the Amendment. *Arnold's Wines*, 571 F.3d at 198-201 (Calabresi, J., concurring). He also concluded that uncertainty existed about the direction the Supreme Court will take with its developing interpretation of the Amendment. Yet he agreed that the majority applied the best understanding of its current meaning. The best understanding is also what we seek.

We pull back from any effort to define the reach of a traditional three-tier retailer. Instead, we resolve whether what Texas has allowed here is so substantially different from what retailing must include as not to be third-tier retailing at all. Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same. Such an authorization therefore is not discrimination in *Granholm* terms. The rights of retailers at a minimum would include making over-the-counter sales. Wine Country's argument implies that is where *Granholm*-approved retailing ends and where the potential for discrimination begins. We disagree. Texas has adjusted its controls over retailers by allowing alcoholic beverage sales to customers other than those who walk into a store. Still, sales are being made to proximate consumers, not those distant to the store. Retailers are acting as retailers and making what conceptually are local deliveries.

Our read of *Granholm* is that the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages. The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment. Regulating alcoholic beverage retailing is largely a State's prerogative.

Granholm prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries. Yet it also has not discriminated among retailers. Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case—allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties—would grant out-of-state retailers dramatically greater rights than Texas ones.

Wine Country argues that Texas has created the need for that outsized remedy through its discrimination, and Texas can eliminate local unfairness by broadening the rights granted its own retailers. The problem with the argument is that it ignores the Twenty-first Amendment. When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the State. Starting at that point, we see no discrimination in the Texas law.

We view local deliveries as a constitutionally benign incident of an acceptable three-tier system.

That view is consistent with the unquestioning reference by the Supreme Court in *Granholm* to a Michigan statute that authorized retailers to make home deliveries under certain conditions. *Granholm*, 544 U.S. at 469.[7] A State's granting this authority to retailers is neither recent nor unique. Texas has permitted direct delivery and carrier shipment by in-state retailers at least since 1977. TEX. ALCO. BEV. CODE § 22.03 (Vernon 2006, adopted Sept. 1, 1977). Some other States also allow delivery by in-state retailers.[8] A State's right to authorize a variety of retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless. Yet it seems to us that implementing consumer-friendly practices for in-state retailing of these products often has more to do with changing economic realities than with the Constitution.

We hold that the limited rights Texas has given its state-licensed retailers to make deliveries do not transgress the dormant Commerce Clause.

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[7] Michigan has subsequently repealed this provision and banned all direct shipment by retailers, perhaps in response to the ruling of the district court in *Siesta Vill. Mkt.*, 596 F. Supp. 2d 1035. *See* MICH. COMP. LAWS ANN. § 436.1203(2) (amend. eff. March 31, 2009).

[8] *See, e.g.*, COLO. REV. STAT. ANN. § 12-47-407(3) & § 408(3); FLA. STAT. ANN.§ 561.57(1); 235 ILL. COMP. STAT. ANN. § 5/5-1(d); IND. CODE ANN. § 7.1-3-9-9; IOWA ADMIN. CODE r. 185-17.1(1); ME. REV. STAT. ANN. tit. 28-A, § 2077(2) & (3); MD. CODE ANN. art. 2B, § 2-301(b)(1); MASS. GEN. LAWS ANN. ch. 138, § 22; MINN. R. 7515.0580; N.J. ADMIN. CODE § 13:2-20.3; N.Y. COMP. CODES R. & REGS. tit. 9, § 67.1; 02-040-016 R.I. CODE R. § 4(10).

We now turn briefly to the separate provisions regarding personal importing. As mentioned before, Texas has placed a limit on the quantity of alcoholic beverages that an individual can purchase out-of-state and then bring into Texas. TEX. ALCO. BEV. CODE §§ 107.05(a) & 107.07(a). Preliminarily, it should not be overlooked that Texas did not, indeed can not, limit the number of alcoholic beverages consumers may buy at an out-of-state retailer. Any purchase limits would have to come from the other State's laws. The barrier Texas imposes is at its border.

We conclude that the incidental effect on foreign retail sales resulting from limits on quantities to be brought into Texas is at worst an acceptable balancing. The interests of Texas consumers in purchasing alcoholic beverages outside of Texas are recognized, but the State validly insists that the vast majority of the alcoholic beverages consumed in Texas be obtained through its own retailers. In effect, Texas has granted a limited exception to the three-tier system. We find no constitutional defect. *See Brooks*, 462 F.3d at 353-54 (similar provision in Virginia law upheld against dormant Commerce Clause challenged).

CONCLUSION

We reverse the district court's holding that the personal import exception authorized by Texas Alcoholic Beverage Code sections 107.05(a) and 107.07(a), has any defect under the dormant Commerce Clause.

We also reserve the district court's invalidation of provisions that only retailers with a physical presence within the State could deliver to consumers

in the State. The provisions as listed by the district court are Texas Alcoholic Beverage Code sections 6.01, 11.01, 22.01, 22.03, 24.01, 24.03, 37.01, 37.03, 41.01, 43.04, 54.12, and 107.07(f).

Consequently, in those respects the district court's judgment is VACATED. We REMAND for entry of judgment consistent with this opinion.

FILED: July 22, 2010
Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10146

WINE COUNTRY GIFT BASKETS.COM; K&L WINE MERCHANTS; BEVERAGES & MORE INC; DAVID L TAPP; RONALD L PARRISH; JEFFREY R DAVIS

Plaintiffs – Appellants-Cross-Appellees

v.

JOHN T. STEEN, JR., Commissioner of the Texas Alcoholic Beverage Commission; GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission; JOSE CUEVAS, JR., Commissioner of the Texas Alcoholic Beverage Commission

Defendants-Appellees-Cross-Appellants

ALLEN STEEN, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Defendant – Appellee-Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY, INC; REPUBLIC BEVERAGE COMPANY

Intervenor Defendants – Appellees-Cross-Appellants

Appeals from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

Appellants' Petition for En Banc Review is DENIED. We withdraw the prior panel opinion, issued on January 26, 2010, and substitute the following.

This case primarily concerns a Texas law that allows alcohol retailers to ship to the door of their local consumers. Out-of-Texas wine retailers claim that the dormant Commerce Clause requires they be given a supposedly reciprocal right to make direct shipments to any Texas consumer. The district court partly accepted their argument. We hold that the statutes do not run afoul of the dormant Commerce Clause. We VACATE and REMAND for entry of judgment.

FACTUAL AND LEGAL BACKGROUND

There were several parties to this case, but they can be grouped easily. One plaintiff, Siesta Village Market LLC, who is a Florida wine retailer, has dismissed its appeal. Another, Wine Country Gift Baskets.com, is a California wine retailer. Wine Country's appellate brief describes the plaintiffs, present and past, as "a group of out-of-state wine retailers and Texas wine consumers." We refer to the plaintiffs collectively as "Wine Country."

Suit was filed by Siesta Village and a few Texas wine consumers on March 31, 2006, in the Dallas Division of the U.S. District Court for the Northern District of Texas. A nearly identical suit was filed by Wine Country, two other California retailers, and a

few named Texas consumers in the Fort Worth Division. The suits were consolidated in the Dallas Division. The wine retailers located outside of Texas wish to ship wine directly to Texas consumers.

Defendants are ~~Allen~~ Alan Steen, the Administrator of the Texas Alcoholic Beverage Commission, and three Commission members sued in their official capacities. They enforce the Texas Alcoholic Beverage Code ("TABC"). We will refer to the various Defendants as "the State" or "Texas."

Two Texas alcoholic beverage wholesalers intervened. These companies are Glazer Wholesale Drug Company, Inc., and Republic Beverage Co.

As do many other States, Texas has a three-tier system for regulating sales of alcoholic beverages. The first tier is the producer, who must sell its product to the second tier, which is a State-licensed wholesaler. The wholesaler distributes the product to the third tier, consisting of State-licensed retailers. Consumers purchase from the retailers. "[S]trict separation between the manufacturing, wholesaling, and retailing levels" of the alcoholic beverage industry must be maintained. TEX. ALCO. BEV. CODE § 6.03(i).

The challenged Texas laws fall into three principal categories. Almost all the relevant provisions apply to alcohol generally, though the complaint is from companies whose commercial interest is solely in wine.

First, some laws allow individuals to bring alcoholic beverages into Texas for their own use, known as a "personal import exception," but limit the quantity. The district court held that this direct-

purchase restriction was unconstitutional in part. "Texas cannot prohibit consumers from purchasing wine from out-of-state retailers who comply with the Code and TABC regulations," the district court held. *Siesta Vill. Mkt., LLC v. Perry*, 530 F. Supp. 2d 848, 868 (N.D. Tex. 2008). It ordered Texas to allow out-of-state retailers to receive Texas-issued retailer permits. Therefore, any consumer who bought wine from an out-of-state holder of a Texas permit would not be subject to the quantity limit when entering the State with the beverages, though the limit for importing would apply to the same person's excessive purchases from out-of-state retailers that did not have Texas permits.

Second, and at the heart of this case, some of the laws allow in-state retailers to deliver alcoholic beverages to their customers within designated local areas, but forbid out-of-state retailers from delivering or shipping alcoholic beverages to customers anywhere in Texas.[1] Retailers may use common carriers licensed under the TABC, which include such companies as ~~Federal Express~~ FedEx. Just before summary judgment motions were filed in the consolidated suits, the Texas legislature amended the prior law which had allowed holders of package store permits or wine-only package store permits to ship their beverages statewide. TEX.

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[1] Although the statutes create some special permits for retailers selling only wine, the statutes allowing local delivery apply to retailers selling only wine and also to full-service package store permit holders. TEX. ALCO. BEV. CODE §§ 22.03(a), 24.03.

ALCO. BEV. CODE § 22.03 (Vernon 2006) (amended Sept. 1, 2007). The amendment drew in the boundaries of the area of permissible shipment from the entire State to basically the county in which the retailer has a store. *Id.* §§ 22.03 & 24.03 (Vernon 2009). The district court held that the statutes discriminated against Wine Country and granted relief.

Third, the suit challenged requirements that the holders of TABC retailer permits have been Texas citizens for one year. The decision in an earlier case declared those provisions unconstitutional insofar as they applied to wholesalers. *S. Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007). The district court in the present case declared the requirements unconstitutional as applied to retailers. The State does not appeal the voiding of the requirement and advised the district court that it will not enforce the citizenship rule.

The parties agreed on a preliminary injunction blocking enforcement of certain provisions for the duration of the lawsuit. On summary judgment, the district court declared twenty-three TABC provisions to be unconstitutional. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 873.

The district court did not, however, provide the remedy Wine Country wanted. The court decided that other provisions of the TABC, though clearly regulating only in-state retailers, should be applied to out-of-state retailers. Thus, Wine Country had a right to make direct shipments to Texas consumers, but it was required to obtain a Texas retailer permit and purchase all wine shipped to Texas consumers

from Texas-licensed wholesalers. Such a "victory" was, if not pyrrhic, apparently of no benefit.[2]

Wine Country's dissatisfaction is evident from the fact it was the first to appeal, thereby becoming the Appellant despite the general success of its arguments. It claimed error in the remedy. The State cross-appealed to argue that its statutes do not violate the dormant Commerce Clause. Siesta Village, the named plaintiff in one of the two consolidated cases, initially was an Appellant but has since dismissed its appeal.

DISCUSSION

The grant of a motion for summary judgment is reviewed *de novo*. *Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 96 (5th Cir. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2).

This appeal almost exclusively concerns questions of law.

Wine Country convinced the district court that numerous TABC provisions violated the dormant Commerce Clause. Wine Country's arguments as the Appellant center on the remedy imposed by the

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[2] The Second Circuit found it operationally absurd for out-of-state retailers to purchase inventory from in-state wholesalers, have it delivered to the retailers in some fashion, then shipped back to in-state consumers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 n.3 (2d Cir. 2009). Wine Country also found the requirement to be dispiriting.

district court. Because we set aside the invalidation of the statutory provisions, issues about the remedial relief implementing the invalidation become moot. We thus do not discuss Wine Country's arguments on the remedy.

The State of Texas as Cross-Appellant does not contest the district court's invalidation of the requirement that retailers establish Texas ~~residency~~ citizenship. That part of the judgment was not included in any notice of appeal and therefore has not been brought to us for reversal or affirmance.

Texas vigorously does contest the holding that the dormant Commerce Clause interfered with what Texas considers to be a right granted by the Twenty-first Amendment to favor in-state retailers in some respects.

Texas also argues that the direct shipping laws are justified by legitimate state interests. It alleges valid local public interests exist and the law has only incidental effects on interstate commerce. Its policy justifications include the State's need to access retail sites for inspection and enforcement, which can uncover illegal activities—specifically regarding alcohol or more generally for money laundering—and the State's goals of promoting temperance, insuring tax collections, and assuring the separation between the three tiers. We do not reach the policy justifications, as our reversal is for other reasons.

The last section in the Texas brief explains its embrace of the remedy that Wine Country rejects. There is no need to review those arguments.

We discuss only the cross-appeal arguments presented by Texas. First, we will examine closely

the United States Supreme Court opinion that spoke strongly and supportively about the three-tier system for distribution of alcohol. We then look at what three subsequent opinions from other courts have said about it. We then briefly review the district court's decision, and finally we apply our analysis to it.

A. The ~~three-tier system~~ Three-Tier System and Granholm

Intoxicating liquor is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant.

> The transportation or importation into any ~~state, territory~~ State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. XXI, § 2. The goals of "promoting temperance, ensuring orderly market conditions, and raising revenue" are met through regulation of the production and distribution of alcoholic beverages. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). The understanding of a State's power under the Twenty-first Amendment may have changed since the 1933 ratification, but we need not review seventy-five years of history. Instead, we rely primarily on the latest Supreme Court explanation.

The basic point Texas makes on appeal is that the three-tier system allows certain kinds of distinctions and particularly allows distinctions between in-state and out-of-state retailers. Further, allowing Texas-

licensed retailers to make their sales in certain ways, namely, by delivery, and prohibiting out-of-state retailers from doing anything at all, is said to be authorized by controlling interpretations of the Twenty-first Amendment.

We start where Texas urges us to start, and where the district court did, by examining the most recent Supreme Court discussion of the interplay between a State's authority to regulate alcohol and the dormant Commerce Clause. *See Granholm v. Heald*, 544 U.S. 460 (2005). The Court reaffirmed the principle that, despite what might appear to be absolute authority granted to States by the Twenty-first Amendment to regulate alcohol, the anti-discrimination principles of the dormant Commerce Clause nonetheless place some restrictions on the States.

The Court said that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 472 (quoting *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994)). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The *Granholm* Court invalidated two States' "direct shipping" laws allowing in-state wineries to ship wine they produced directly to consumers, but barring out-of-state wineries from doing the same. It found the "discriminatory character" of Michigan's prohibition "obvious," as that State's laws prohibited

any shipment from out-of-state wineries, while allowing in-state wineries to ship after obtaining a permit. *Id.* at 473. New York's scheme was more complicated, allowing out-of-state wineries to ship to in-state consumers if the wineries established a physical presence in the State and became part of New York's three-tier distribution system. The Court nonetheless found New York's rules discriminatory, noting that the rules clearly gave "preferential terms" to in-state wineries, which qualified for a simpler permit, did not have to participate in the three-tier system, and could ship wine directly from the site of its production. *Id.* at 474. Both States' laws, then, dealt with producers.

At least as to producers, the Court held that the "Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers." *Id.* at 486.

Once finding the laws discriminatory, the Court examined whether they might be saved by a tenet of the dormant Commerce Clause that exempts laws that "'advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). Obtaining such an exemption requires the "clearest showing" that the law is the only adequate means of serving the State's legitimate purpose. *Id.* at 490 (quoting *C&A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 393 (1994)). The States claimed two purposes—prevention of underage drinking and the need for taxes. *Id.* at 489. The Court found that neither had sufficient evidentiary

support to save those States' laws. *Id.* at 490-92. We do not discuss this point because we determine that the Texas provisions are constitutional and do not need to be saved.

A decision by this court foreshadowed *Granholm*. In it, we struck down Texas laws that allowed Texas wineries to ship directly to consumers and thus bypass going first to a wholesaler, but these laws prohibited out-of-state wineries from doing the same. *Dickerson v. Bailey*, 336 F.3d 388, 406-07 (5th Cir. 2003). The Texas legislature responded to *Dickerson* by authorizing wineries wherever located to ship directly to Texas consumers once they were issued the appropriate permit. TEX. ALCO. BEV. CODE §§ 54.01-.12.

We disagree with Wine Country that *Dickerson* answers today's questions. That precedent, as did *Granholm*, concerned wineries, *i.e.*, the producers of the product traveling in commerce. The producers in a three-tier system often are not located in the State in which the sales occur. The traditional three-tier system, seen as one that funnels the product, *Granholm*, 544 U.S. at 489, has an opening at the top available to all. The wholesalers and retailers, though, are often required by a State's law to be within that State. The distinction is seen in Texas law. It allows wineries themselves, located for example in California or Florida as are the retailer plaintiffs, to ship directly to Texas consumers.

Texas argues that the following language in *Granholm* certifies the constitutionality of the three-tier system that most States use, and is the lens through which the concept of discrimination needs to be seen:

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. at 432; *see also id.* at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers.

Id. at 488-89 (citations reformatted). That language may be *dicta*. If so, it is compelling *dicta*. What we make of that language, and its ability to protect these Texas statutes from Wine Country's dormant Commerce Clause arguments, is the next part of our analysis.

B. Other Courts' Granholm ~~analysis~~ *Analysis*

Granholm dealt specifically with state laws treating in-state and out-of-state producers of alcohol differently. This present appeal involves retailers. Since *Granholm*, other decisions from outside this Circuit have addressed that precedent's applicability to retailers who wish to ship wine into other States. We will discuss the three that are the most relevant.[3]

In the earliest decision, some Virginia consumers and a few out-of-state wineries challenged a Virginia statute that limited the amount of alcohol that consumers could personally carry into the State for their own use. *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006). The plaintiffs' theory was that the provision was unconstitutional because consumers could purchase an unlimited amount of wine from in-state sources but only limited amounts out-of-state for their personal importation into Virginia.

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[3] A fourth decision analyzing *Granholm* was recently released, but we find nothing in it to affect our reasoning. *Family Winemakers of Cal. v. Jenkins*, ~~No. 09-1169, 2010 WL 118387, at *5-15 (1st Cir. Jan. 14, 2010)~~ 592 F.3d 1, 20-21 (1st Cir. 2010) (state law granting distribution rights to "small" wineries was held to discriminate infavor of in-state wineries, all of whom were "small").

The opinion for the court held that plaintiffs' effort to compare in-state retailers to out-of-state retailers and then allege they were treated differently was fundamentally a challenge to the three-tier system itself. *Brooks*, 462 F.3d at 352 (Niemeyer, J.).[4] Because the Supreme Court had described the three-tier system as "unquestionably legitimate," the court held the Virginia statutes to be constitutionally sound. *Id.* (quoting *Granholm*, 511 U.S. at 489).

In another decision, there were challenges to New York statutes that are analogous to those here. New York law permitted an in-state alcoholic beverage retailer to deliver directly to consumers' residences in New York, using the retailer's vehicles or by using vehicles of a transportation company licensed by the State's liquor authority; out-of-state retailers did not have comparable rights. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir. 2009).

The Second Circuit started with a recognition that the Twenty-first Amendment does not authorize all alcohol regulation. Any discrimination between in-state and out-of-state alcohol products or producers must reasonably further a legitimate state interest "that cannot adequately be served by reasonable nondiscriminatory alternatives." *Id.* at 189 (citation omitted). The court's focus on "products

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[4] Judge Niemeyer wrote for the court, but a second judge concurred only in the judgment with respect to this part of the opinion, while the third judge on the panel dissented from that part. This reasoning presumably has limited precedential effect in that Circuit.

or producers" is the central debate: how much further, if at all, beyond products and producers do the anti-discrimination principles go?

The Second Circuit held products and producers are the limit. It described plaintiffs' arguments as simplistic analogies to the *Granholm*-identified discrimination. A State's making distinctions among in-state and out-of-state retailers, and even requiring wholesalers and retailers to be present in and licensed by New York, were fundamental components of the three-tier system authorized in *Granholm*. *Id.* at 190.

The court concluded that the New York laws permitting only in-state retailers to ship directly to consumers were in "stark contrast" to the laws struck down in *Granholm*, which "created specific exceptions to the states' three-tier systems favoring in-state producers." *Id.* at 191. It found that the production-related discrimination involved in *Granholm* "was exactly the type of economic protectionist policy the Commerce Clause sought to forestall, and where the *Granholm* Court drew the line." *Id.*

The line drawn by the court was between the broad state powers under the Twenty-first Amendment "to regulate the transportation, sale, and use of alcohol within their borders," and any "attempts to discriminate in favor of local products and producers." *Id.* It held New York's laws were evenhanded in their control of "importation and distribution of liquor within the state," and that made the dormant Commerce Clause all but irrelevant. *Id.* at 192.

In the third case, the court considered a Michigan law authorizing some in-state retailers to ship wine directly to consumers, while out-of-state retailers without a physical presence in Michigan could not. *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037-38 (E.D. Mich. 2008). The Michigan court 2008), *vacated as moot*, Order Dismissing Action, July 17, 2009.[5] The Michigan court limited the effect of the Supreme Court's *Granholm* decision: "While the [*Granholm v.*] *Heald* court did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests." *Id.* at 1039. The court found that "regulations creat[ing] an extra burden on out-of-state wine retailers" were not saved by the Twenty-first Amendment. *Id.* The court also held it to be insufficient that out-of-state retailers could comply with Michigan law by establishing a location in the State. The "prohibitive" expense of opening physical stores in multiple States gave a clear advantage to in-state retailers. *Id.* at 1040 (citing *Granholm*, 544 U.S. at 474-75). Accordingly, the court struck down the Michigan laws.

C. The District Court's Interpretation

The district court here considered the Texas "Personal Import Exception," which authorizes individuals to import alcohol for their own use. One section prohibits importation unless authorized.

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[5] An appeal to the Sixth Circuit was apparently mooted by an intervening change in the Michigan statutes being challenged.

TEX. ALCO. BEV. CODE §107.05. That section is then made inapplicable to Texas residents who import for personal use not more than one quart of liquor, ~~one gallon~~ three gallons of wine, or twenty-four twelve-ounce bottles of beer. *Id.* § 107.07. There is no direct limit on how much can be purchased, only on how much can be imported.

These provisions were held by the district court to discriminate against out-of-state retailers because they "prohibit ~~customers~~ consumers from purchasing wine from out-of-state retailers" in unlimited quantities. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 868. The remedy was to allow out-of-state retailers to apply for Texas retail permits, even without the retailers' opening a location in the State. Any retailer with a Texas permit and making sales at locations outside of Texas could not be limited in sales volumes when those limits do not apply to Texas permit holders making sales inside Texas.

The district court also held that the Texas local shipping rights were discriminatory. The court held the relevant question to be whether there was discrimination "with respect to access to *in-state markets*," and there could be no exception for *de minimis* levels of discrimination. *Id.* at 864 (emphasis in original). The disability imposed on out-of-state retailers was not a "mere practical consequence" of location, as it might be if Texas permitted only over-the-counter sales of alcohol. Since Texas allowed in-state retailers to ship alcohol, there was no practical reason why out-of-state retailers could not also. *Id.* at 865-66. Shipping was the key, because shipping was as easily done from outside the State as from within.

Having found the Texas laws discriminatory, the court turned to the question of whether the State could show legitimate local purposes, not obtainable by nondiscriminatory alternatives, to justify the discrimination. We do not ultimately reach that analysis, so we do not summarize it here.

D. Dormant Commerce Clause Analysis

We first analyze the provisions that allow an in-state retailer to deliver within its county but bars an out-of-state retailer from shipping into Texas. Texas argues that distinguishing between retailers in this way is a fundamental part of the constitutional three-tier system, which is "unquestionably legitimate." *Granholm*, 544 U.S. at 488-89.

To the contrary, Wine Country focuses on the *Granholm* prohibition on a state's liquor laws discriminating against out-of-state interests. Wine Country acknowledges that the Court limited its holding to discrimination benefitting alcohol on the basis of its in-state production status, but Wine Country argues that makes sense as that was the *Granholm* dispute. Texas argues the *Granholm* failure to mention retailers was significant, as distinctions favoring in-state retailers are inherently part of the three-tier system.

We first note what is not in issue. The discrimination that *Granholm* invalidated was a State's allowing its wineries to ship directly to consumers but prohibiting out-of-state wineries from doing so. Texas grants in-state and out-of-state wineries the same rights. TEX. ALCO. BEV. CODE §§ 54.01-54.12.

Such discrimination—among producers—is not the question today. When analyzing what else is invalid under the Supreme Court's *Granholm* reasoning, we find direction in a source for some of the Court's language. The Court quoted a 1986 precedent that ~~"a comprehensive system for the distribution of liquor within [North Dakota's] borders" was "unquestionably legitimate."~~ North Dakota's three-tier system was "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1986)). North ~~Dakota employed a three-tier system~~ Dakota's system was similar to that in Texas, in which producers sell to state-licensed wholesalers, who sell to state-licensed retailers. *North Dakota*, 495 U.S. at 428. That sort of system has been given constitutional approval. The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that. The legitimizing is thus a caveat to the statement that the Commerce Clause is violated if state law authorizes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotation marks and citation omitted).

Therefore, the foundation on which we build is that Texas may have a three-tier system. That system authorizes retailers with locations within the State to acquire Texas permits if they meet certain eligibility requirements. Those retailers must purchase their alcoholic beverages from Texas-licensed wholesalers, who in turn purchase from

producers. Each tier is authorized by Texas law and approved by the Twenty-first Amendment—so says *Granholm*—to do what producers, wholesalers, and retailers do.[6]

Wine Country argues that the three tiers have tumbled because Texas has permitted retailers to make home deliveries within a confined range. At least in part, this must be an argument that Texas retailers are being allowed to act in ways that are unacceptable for retailers in a constitutionally sound system. The defect is one of discrimination: Texas retailers are doing what a retailer in California or Florida physically and practically can do, which is to use a licensed shipper to deliver to a Texas consumer, but legally cannot do.

To address the argument, it would be useful to know what specific actions allegedly caused the retailers to stop being *Granholm*-approved, traditional third-tier retailers. If Texas allowed a retailer to carry the beverages to a customer's vehicle parked in its lot, or across the street, would that be a problem? If a retailer's own delivery trucks traveled to the customer, is that discrimination? Does discrimination not begin until a retailer uses a licensed shipper? Relevant to the answer, Texas has not defended on the basis that retailers are just

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[6] Wine Country at oral argument emphasized a provision of Texas law allowing Texas retailers to receive direct shipments from Texas wineries, bypassing the wholesaler tier. *See* TEX. ALCO. BEV. CODE § 110.053. This provision is not on the list of those enjoined by the district court and is not a subject of this appeal. *Siesta Vill Mkt.*, 530 F. Supp. 2d at 851.

permitted to serve their usual local markets in enhanced, customer-friendly ways. Indeed, at oral argument, the Texas Solicitor General said that the geographical limits to local deliveries were irrelevant. The prior state-wide delivery version of the provision would be constitutional under that argument. We need not and do not reach the broader definitional issue.

In analyzing "retailing" for Twenty-first Amendment purposes, we find a useful warning in concurring Judge Calabresi's observations in *Arnold's Wines*. He found a tension between the original (likely) meaning of the Twenty-first Amendment and the current interpretation, a change largely the result of Supreme Court reaction to the changing economic and social world since the adoption of the Amendment. *Arnold's Wines*, 571 F.3d at 198-201 (Calabresi, J., concurring). He also concluded that uncertainty existed about the direction the Supreme Court will take with its developing interpretation of the Amendment. Yet he agreed that the majority applied the best understanding of its current meaning. The best understanding is also what we seek.

We pull back from any effort to define the reach of a traditional three-tier retailer. Instead, we resolve whether what Texas has allowed here is so substantially different from what retailing must include as not to be third-tier retailing at all. Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same. Such an authorization therefore is not

discrimination in *Granholm* terms. The rights of retailers at a minimum would include making over-the-counter sales. Wine Country's argument implies that is where *Granholm*-approved retailing ends and where the potential for discrimination begins. We disagree. Texas has adjusted its controls over retailers by allowing alcoholic beverage sales to customers other than those who walk into a store. Still, sales are being made to proximate consumers, not those distant to the store. Retailers are acting as retailers and making what conceptually are local deliveries.

Our read of *Granholm* is that the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages. The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment. Regulating alcoholic beverage retailing is largely a State's prerogative.

Granholm prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries. Yet it also has not discriminated among retailers. Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case—allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties—would grant out-of-state retailers dramatically greater rights than Texas ones.

Wine Country argues that Texas has created the need for that outsized remedy through its

discrimination, and Texas can eliminate local unfairness by broadening the rights granted its own retailers. The problem with the argument is that it ignores the Twenty-first Amendment. When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the State. Starting at that point, we see no discrimination in the Texas law.

We view local deliveries as a constitutionally benign incident of an acceptable three-tier system. That view is consistent with the unquestioning reference by the Supreme Court in *Granholm* to a Michigan statute that authorized retailers to make home deliveries under certain conditions. *Granholm*, 544 U.S. at 469.[7] A State's granting this authority to retailers is neither recent nor unique. Texas has permitted direct delivery and carrier shipment by in-state retailers at least since 1977. TEX. ALCO. BEV. CODE §22.03 (Vernon 2006, adopted Sept. 1, 1977). Some other States also allow delivery by in-state retailers.[8] A State's right to authorize a variety of

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[7] Michigan has subsequently repealed this provision and banned all direct shipment by retailers, perhaps in response to the ruling of the district court in *Siesta Vill. Mkt.*, 596 F. Supp. 2d 1035. *See* MICH. COMP. LAWS ANN. § 436.1203(2) (amend. eff. March 31, 2009)).

[8] *See, e.g.*, COLO. REV. STAT. ANN. § 12-47-407(3) & § 408(3); FLA. STAT. ANN.§ 561.57(1); 235 ILL. COMP. STAT. ANN. § 5/5-1(d); IND. CODE ANN. § 7.1-3-9-9; IOWA ADMIN. CODE r. 185-17.1(1); ME. REV. STAT. ANN. tit. 28-A, § 2077(2) & (3); MD. CODE ANN. art. 2B, § 2-301(b)(1); MASS. GEN. LAWS ANN. ch.

retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless. Yet it seems to us that implementing consumer-friendly practices for in-state retailing of these products often has more to do with changing economic realities than with the Constitution.

On rehearing, Wine Country argues that we disregarded the methodology required to analyze this kind of claim. When statutes that regulate alcohol facially discriminate against out-of-state interests, generally we ask two questions: (1) do the statutes violate the Commerce Clause and, (2) if so, are they saved by Section 2 of the Twenty-First Amendment? *Dickerson*, 336 F.3d at 395-96 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79, 584-85 (1986)). After *Dickerson*, though, the Supreme Court reiterated the legitimacy of the three-tier system. *Granholm*, 544 U.S. at 489. The present appeal challenged an inherent aspect of that system. Because *Granholm* told us that the three-tiers are legitimate under the Twenty-first Amendment, we did not need to take the steps of *Dickerson* first. In effect, *Granholm* already worked out the answer to the analysis.

Also alleged is that we disregarded *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). There we invalidated a requirement that certain alcohol permits could be issued only if the recipient had been a Texas resident for one year. *Id.* at 555. Our case

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138, § 22; MINN. R. 7515.0580; N.J. ADMIN. CODE § 13:2-20.3; N.Y. COMP. CODES R. & REGS. tit. 9, § 67.1; 02-040-016 R.I. CODE R. § 4(10).

concerns physical location of businesses; *Cooper* concerned legal residence of owners. The former is a critical component of the three-tier system, while the latter is not involved. The opinions are consistent.

~~We hold~~ We conclude that the limited rights Texas has given its state-licensed retailers to make deliveries do not transgress the dormant Commerce Clause.

There is one final issue. We mentioned that the remedy ordered by the district court was to require Texas to issue retailer permits to out-of-state retailers. Such permit holders wherever located could ship directly to Texas residents. Also benefitted by the district court's order were those individuals who wanted to avoid the limit Texas placed on the quantity of alcoholic beverages that could be purchased out-of-state and then be taken into Texas for personal use. TEX. ALCO. BEV. CODE §§ 107.05(a) & 107.07(a). ~~Preliminarily, it should not be overlooked that Texas did not, indeed can not, limit the number of alcoholic beverages consumers may buy at an out-of-state retailer. Any purchase limits would have to come from the other State's laws. The barrier Texas imposes is at its border.~~

~~We conclude that the incidental effect on foreign retail sales resulting from limits on quantities to be brought into Texas is at worst an acceptable balancing. The interests of Texas consumers in purchasing alcoholic beverages outside of Texas are recognized, but the States validly insists that the vast majority of the alcoholic beverages consumers in Texas be obtained through its own retailers. In effect, Texas has granted limited exception to the three-tier system. We find no constitutional defect.~~

~~*See Brooks*, 462 F.3d at 353.54 (similar provision in Virginia law upheld against dormant Commerce Clause challenge).~~ If the person entering Texas could show that the alcohol being transported for personal use was bought from an out-of-state holder of one of the newly-mandated Texas retailer permits, no limit on quantity could be imposed. If the alcohol was not so purchased, the quantity could be limited.

We have held that Texas can require its authorized retailers to sell from locations physically located in Texas. Therefore, the dormant Commerce Clause does not support ordering Texas to issue retail permits for use at out-of-state locations. No other issue about the personal importation limit is meaningfully raised. We leave the provision fully in force.

CONCLUSION

~~We reverse the district court's holding that the personal import exception authorized by Texas Alcoholic Beverage Code sections 107.05(a) and 107.07(a), has any defect under the dormant Commerce Clause.~~

~~We also reserve the district court's invalidation of provision that only retailers with a physical presence within the State could deliver to consumers in the State. The provisions as listed by the district court are Texas Alcoholic Beverage Code sections 6.01, 11.01, 22.01, 22.03, 24.01, 24.03, 37.01, 37.03, 37.03, 41.01, 43.04, 54.12, and 107.07(f).~~

We reverse the district court's judgment in validating the requirement that only retailers with a physical presence within the State could receive retailer permits or deliver to consumers in the State.

The provisions as listed by the district court were Texas Alcoholic Beverage Code sections 22.03, 24.03, 54.12, and 107.07(f). We reinstate those to the extent the district court's judgment nullified them. Our reversal leaves in place the district court's voiding of provisions that retailers be Texas citizens for one year. No challenge to that ruling was brought to us.

Nothing in this opinion precludes the enforcement, as written, of the personal importation exception authorized by Texas Alcoholic Beverage Code sections 107.05(a) and 107.07(a).

~~Consequently, in those~~ In these respects the district court's judgment is VACATED. We REMAND for entry of judgment consistent with this opinion.

Case: 08-10146 Document: 00511213363 Date Filed: 08/24/2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10146

WINE COUNTRY GIFT BASKETS.COM; K&L WINE MERCHANTS; BEVERAGES & MORE INC; DAVID L TAPP; RONALD L PARRISH; JEFFREY R DAVIS

Plaintiffs – Appellants-Cross-Appellees

v.

JOHN T. STEEN, JR., Commissioner of the Texas Alcoholic Beverage Commission; GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission; JOSE CUEVAS, JR., Commissioner of the Texas Alcoholic Beverage Commission

Defendants – Appellees-Cross-Appellants

ALLEN STEEN, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Defendant – Appellee-Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY, INC; REPUBLIC BEVERAGE COMPANY

Intervenor Defendants – Appellees-Cross-Appellants

Appeals from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____, F.3d _____)

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ *Leslie H. Southwick*
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SIESTA VILLAGE MARKET, LLC, d/b/a SIESTA MARKET, et al.,

Plaintiffs,

vs.

RICK PERRY, Governor of Texas, et al.,

Defendants.

Civil Action No. 3:06-CV-0585-D
(Consolidated with Civil Action
No. 4:06-CV-0232-D)

FITZWATER, Chief Judge:

These are consolidated actions in which plaintiffs challenge various provisions of the Texas Alcoholic Beverage Code ("Code") as unconstitutional under the dormant Commerce Clause because they preclude out-of-state wine retailers from selling and shipping wine to Texas consumers. Intervenors—two Texas-licensed wine wholesalers—defend the constitutionality of the challenged Code provisions, and they assert claims arising from an agreed preliminary injunction ("Agreed Injunction") entered into by certain plaintiffs and the Administrator of the Texas Alcoholic Beverage Commission ("TABC") that allows out-of-state retailers to ship wine directly to Texas consumers. The court concludes that Texas'

ban on the sale and shipment of wine by out-of-state retailers to Texas residents is unconstitutional, but it also holds that the requirement that wine retailers—including out-of-state retailers—first purchase such wine from Texas-licensed wholesalers is constitutional.

Plaintiffs the Siesta Village plaintiffs[1] and the Wine Country plaintiffs[2] challenge the constitutionality of various Code provisions on the ground that they preclude out-of-state wine retailers from selling and shipping wine to consumers located in the state of Texas. The Code sections at issue are Tex. Alco. Bev. Code §§ 6.01, 6.03, 11.01, 11.03, 11.46(a)(11), 11.61(b)(19), 22.01, 22.03, 24.01, 24.03, 41.01, 54.12, 107.05(a), 107.07(a), 107.07(f), and 109.53 (Vernon 2007 & Supp. 2007-08). Insofar as relevant to this litigation, these provisions ban the sale and shipment of wine by out-of-state retailers to Texas consumers, and they impose permit and citizenship requirements on wine retailers that plaintiffs maintain are unconstitutional as applied to out-of-state retailers. They also ban the importation of wine by Texas residents, except in limited

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[1] Plaintiffs the Siesta Village plaintiffs consist of plaintiffs Siesta Village Market, LLC, a wine retailer located in the state of Florida, and Ken Travis, Ken Gallinger, Maureen Gallinger, and Dr. Robert Brockie, consumer residents of the state of Texas.

[2] The Wine Country plaintiffs consist of plaintiffs Wine Country Gift Baskets.com, K&L Wine Merchants, and Beverages & More, Inc., wine retailers located in the state of California, and David L. Tapp, Ronald L. Parrish, and Jeffrey R. Davis consumer residents of the state of Texas.

quantities for personal use. The Siesta Village plaintiffs and the Wine Country plaintiffs contend that these laws discriminate against interstate commerce, in violation of the dormant Commerce Clause.

The defendants are John T. Steen, Jr., Gail Madden, and Jose Cuevas, Jr., who are sued in their official capacities as TABC Commissioners; Alan Steen ("Steen"), sued in his official capacity as Administrator of the TABC; and Rick Perry ("Governor Perry") and Greg Abbott ("General Abbott"), sued in their official capacities as Governor and Attorney General of Texas, respectively.

Intervening on behalf of the Texas regulatory scheme are TABC-licensed wholesalers Glazer's Wholesale Drug Company, Inc. ("Glazer") and Republic Beverage Company ("Republic"). Glazer and Republic have also filed a cross-claim against Steen[3] and counterclaims against plaintiffs. Essentially, they defend the constitutionality of the Code provisions that plaintiffs challenge, and they complain that defendant Steen has violated their rights under the Equal Protection Clause and Commerce Clause through a policy of not enforcing the Code against out-of-state wine retailers and by entering into the Agreed Injunction.[4]

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[3] Although the cross-claim refers to all defendants, only Steen answered the cross-claim, and it is clear from the record that he is the only defendant whom Glazer and Republic intended to include as a defendant.

[4] The cross-claim against Steen is only based on the Agreed Injunction. Glazer and Republic also complain in their

The sale, shipment, and delivery of wine in Texas is governed by the Code, Tex. Alco. Bev. Code §§ 1.01-251.82 (Vernon 2007 & Supp. 2007-08). Like other states, Texas regulates the sale and importation of most alcoholic beverages—including wine—through a three-tier system. Producers of alcoholic beverages must be licensed by the TABC and are legally able to sell in Texas only to TABC-licensed[5] wholesalers, who in turn may only legally sell to TABC-licensed retailers, who may then legally sell to Texas consumers. The Code makes an exception for wine producers or for wineries who hold either a TABC winery permit or a TABC out-of-state winery direct shipper permit that allows them to sell directly to Texas consumers without selling first to a licensed wholesaler or retailer.

Various Code provisions forbid anyone from holding a TABC permit or otherwise selling wine in Texas who has not been a Texas citizen for at least one year. *See* Tex. Alco. Bev. Code §§ 6.03, 11.46(a)(11) 11.61(b)(19), 24.01(c), and 109.53. These provisions have been declared unconstitutional as applied to wholesalers located within the state of Texas for less than one year. *S. Wine & Spirits of*

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summary judgment briefing that, before the Agreed Injunction was entered, the TABC adopted a policy of not enforcing the Code against out-of-state retailers.

[5] The Code distinguishes a "permit" (for wine and spirits) from a "license" (for beer only). *See* Tex. Alco. Bev. Code §§ 11.01(a) and 61.01 (Vernon 2007). Because the parties use the terms "permit" and "license" interchangeably, the court will do so as well.

Tex. v. Steen, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007). As the court explains infra in § III(B), their constitutionality has not yet been determined as to out-of-state retailers.

Through provisions separate from the citizenship requirements, the Code also allows in-state retailers to sell and ship wine to Texas consumers, but the Code denies this right to out-of-state retailers. *See* Tex. Alco. Bev. Code §§ 22.03, 24.03, 54.12, and 107.07(f). With limited exceptions, the Code also forbids consumers from purchasing wine from out-of-state retailers. *See id.* §§ 107.05(a) and 107.07(a).[6]

After the Wine Country plaintiffs filed their lawsuit, they and defendant Steen entered into the Agreed Injunction, which permits out-of-state retailers to ship wine directly to Texas consumers.[7] In addition to siding with defendants in defending the regulatory scheme, intervenors Glazer and Republic complain that the Agreed Injunction is detrimental to the public interest of the State of Texas ("State"). They maintain that the Agreed Injunction undermines the State's temperance concerns, causes the State to lose tax revenues, and undermines the State's orderly markets by not

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[6] These provisions have been declared unconstitutional as applied to purchases from out-of-state wine producers. *See Dickerson v. Bailey*, 336 F.3d 388, 397, 402-03 (5th Cir. 2003).

[7] The parties entered into the Agreed Injunction before these two cases were consolidated. Another judge of this court approved the agreed relief before transferring to the undersigned's docket the case in which the Agreed Injunction was entered.

requiring out-of-state retailers to comply with the regulations imposed on in-state retailers. Glazer and Republic also bring a cross-claim against defendant Steen, alleging that the TABC lacked authority to contradict the legislative requirements of the Texas three-tier system when the parties entered into the Agreed Injunction. Glazer and Republic contend that by not enforcing Texas law against out-of-state retailers, the TABC has compromised the business interests of alcoholic beverage wholesalers, and that the discriminatory enforcement of the Code against in-state retailers has only provided a competitive advantage to out-of-state businesses. Glazer and Republic complain that such conduct amounts to an unequal application of state law, and thus violates their rights under the Commerce Clause and Equal Protection Clause. Based on their cross-claim, they request that the Agreed Injunction be vacated. Glazer and Republic also bring counterclaims requesting that the court declare that the Code provisions that plaintiffs challenge as unconstitutional are in fact constitutional and valid components of the Texas three-tier system.

The following motions are pending for resolution and have been orally argued: (1) intervenors' April 26, 2007 motion to dissolve the Agreed Injunction; (2) the Siesta Village plaintiffs' May 29, 2007 motion (as corrected June 8, 2007) for summary judgment; (3) intervenors' June 28, 2007 motion (as amended June 29, 2007) for summary judgment as to the consolidated plaintiffs' claims and as to intervenors' counterclaims; (4) intervenors' June 28, 2007 motion (as amended June 29, 2007) for summary judgment as to their cross-claim against defendant Steen; (5) defendants' June 29, 2007 motion for summary

judgment on plaintiffs' claims; (6) defendant Steen's June 29, 2007 motion for summary judgment on intervenors' cross-claim; (7) the Wine Country plaintiffs' June 29, 2007 motion for summary judgment on the Wine Country plaintiffs' claims; and (8) the Wine Country plaintiffs' June 29, 2007 motion for summary judgment on intervenors' counterclaims.[8]

II

Before reaching the merits of plaintiffs' constitutional claims, the court must consider certain preliminary questions, the first of which is an Eleventh Amendment immunity defense that defendants raise on behalf of Governor Perry and General Abbott.

A

When state officials such as Governor Perry and General Abbott are sued in their official capacities, they assume the identity of the state that employs them and thus share the state's Eleventh Amendment immunity from private suits. *See Hafer v. Melo*, 502 U.S. 21, 26-27 (1991). The doctrine of *Ex Parte Young* carves out a narrow exception to this general grant of immunity and permits private parties to obtain injunctive relief against state officers for violations of federal law. *P.R. Aqueduct*

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[8] The parties seek to exclude portions of the summary judgment evidence. Because the court has not relied on the challenged evidence in deciding these motions, it denies these requests as moot.

& Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). But

> [i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making ... the state a party.

Ex Parte Young, 209 U.S. 123, 157 (1908) (emphasis added).

The Fifth Circuit has reaffirmed the nexus requirement between the statute being challenged and the state officer's duty to enforce it. *See Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (holding that *Young* "exception only applies when the named defendant state officials have *some connection with the enforcement of the act* and 'threaten and are about to commence proceedings' to enforce the unconstitutional act." *Id.* (emphasis in original) (quoting *Young*, 209 U.S. at 155-56)). "Thus, any probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute." *Id.* at 417. The plaintiffs in *Okpalobi* sued the Louisiana Governor and Attorney General to enjoin enforcement of a state statute. *Id.* at 409. While the statute being challenged "on its face, [did] not direct the State or its officers to do anything," a Fifth Circuit panel held that the suit against the Governor and Attorney General fit within the *Young* exception, because each had a general duty to uphold and

enforce state law. *Id.* at 417. The *en banc* Fifth Circuit reversed and dismissed the state officials from the suit, holding that the panel had erred in interpreting *Young* as relaxing the "special charge" requirement of *Fitts v. McGhee*, 172 U.S. 516, 529 (1899) (dismissing state officials from suit for injunctive relief because neither was specially charged with duty to enforce statute being challenged). *Id.* at 419. "In sum, *Young* does not minimize the need to find an actual enforcement connection—some enforcement power or act that can be enjoined—between the defendant official and the challenged statute." *Id.*

B

Defendants contend that Governor Perry lacks sufficient enforcement powers over the TABC to be a proper defendant in a *Young* suit. The court agrees.

It is clear that Governor Perry's general responsibility to defend the Texas Constitution and the laws of the state falls short of *Fitts*'s "special charge" requirement. The Code broadly commits its enforcement to the three TABC Commissioners. *See* Tex. Alco. Bev. Code §§ 5.02 and 5.31. Although the Code does grant the Governor, with the advice and consent of the Senate, the authority to appoint the Commissioners to six-year terms, *id.* § 5.02, there is no authority granting the Governor control of the actions of the Commissioners once they are appointed. Indeed, the Code severely restricts the grounds to remove a Commissioner. *See id.* § 5.051. Thus Governor Perry's appointment authority over the Commissioners does not confer on him enforcement power over the TABC.

The Siesta Village plaintiffs point to Governor Perry's authority over Special Inspectors as a sufficient connection to enforcement of the challenged statutes. *See id.* § 5.142(b) (Vernon 2007). But these Special Inspectors are also subject to the orders of the TABC, and only the TABC decides whether Special Inspectors exist at all, *id.* § 5.142(a). Moreover, the Commissioners can remove a Special Inspector at any time for cause. *Id.* § 5.142(e). The Siesta Village plaintiffs do not contend that the Commissioners have appointed anyone as a Special Inspector. Without Special Inspectors, Governor Perry has no enforcement power over the TABC. But even if Special Inspectors do exist, the Code suggests that they serve an ancillary role in enforcing the Code. Their term of service is expressly limited to fewer than two years, they are removable by the TABC at any time for cause, and they are not entitled to take compensation from the State. *See id.* § 5.142(d) and (e). Therefore, Governor Perry's concurrent power over TABC Special Inspectors does not grant him sufficient enforcement power over the TABC to be a proper defendant in a *Young* suit.

Accordingly, the court dismisses Governor Perry as a defendant.

C

General Abbott, in contrast with Governor Perry, has statutory authority to enforce the Code. Among his powers is the explicit authority to "begin proceedings in district court to restrain [a] person from violating the code or operating under [a] permit or license." *Id.* § 101.01(c). Once the Attorney General obtains an injunction under this provision,

the enjoined party's violation of the injunction "operates to cancel without further proceedings any license or permit held by the person." *Id.* To assist in investigating violations, the Code confers on the Attorney General the power to examine the records of any permittee "as often as he considers necessary." *Id.* § 37.12. Section 109.53 of the Code—one of the one-year Texas residency and citizenship provisions that plaintiffs challenge—confers on the Attorney General the authority to sue any company permit holder who is violating the Texas citizenship requirement for cancellation of the company's corporate charter. The court therefore holds that General Abbott is "specially charged" with enforcing the Code.

Defendants contend that even if this is so, it does not entirely resolve the question of General Abbott's amenability to suit under *Young*. *Okpalobi* requires that, in addition to establishing General Abbott's *ability* to enforce the Code, plaintiffs must demonstrate his demonstrated *willingness* to do so. *See Okpalobi*, 244 F.3d at 417. Consistent with this requirement, the Supreme Court has emphasized that, before *Young* relief is available, "the prospect of [a] state suit must be imminent." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) ("*Ex parte Young* thus speaks of enjoining state officers '*who threaten and are about to commence proceedings.*'" (quoting *Young*, 209 U.S. at 156) (emphasis in original)). Defendants submit affidavits from two TABC officials who attest that they are not aware of any instance in which the TABC has asked the Attorney General to seek an injunction to enforce the Code. They also point to the Siesta Village plaintiffs' failure to produce evidence

that General Abbott has threatened, or shown a willingness, to enforce the Code provisions being challenged.

Defendants' affidavits establish only that the TABC has not requested that the Attorney General exercise his statutory authority to enforce the Code, not that the Attorney General has not done so. The Attorney General's authority to initiate proceedings against those who violate the Code is not contingent on the TABC's approval or request. *See* Tex. Alco. Bev. Code §§ 101.01 and 109.53.

But the court agrees with defendants that General Abbott should be dismissed as a defendant based on their other argument: that the Siesta Village plaintiffs have failed to produce any evidence that General Abbott has threatened to enforce, or has previously enforced, the challenged provisions. Without proof of General Abbott's willingness to enforce the Code provisions at issue, the Siesta Village plaintiffs cannot rely on *Young* to overcome his Eleventh Amendment immunity. The *Young* doctrine carves out a narrow exception to such immunity, *see P.R. Aqueduct & Sewer Authority*, 506 U.S. at 146, and the Siesta Village plaintiffs have failed to satisfy *Okpalobi*'s "demonstrated willingness" prong for obtaining *Young*-type relief.

Accordingly, the court dismisses General Abbott as a defendant.

III

The second preliminary question the court must address before deciding the merits of plaintiffs' constitutional claims is defendants' contention that the Texas Legislature's enactment of S.B. 1229,

which amended § 22.03 of the Code, and Judge Yeakel's decision in *Southern Wine*, 486 F. Supp. 2d 626, render moot the constitutional challenges that plaintiffs have pleaded.

A

"It is well-settled ... that mootness is a threshold jurisdictional inquiry." *La. Envtl. Action Network v. U. S. Envtl. Protection Agency*, 382 F.3d 575, 580 (5th Cir. 2004) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988)). "A case is moot if the issues presented are no longer live." *AT&T Commc'ns of the Sw., Inc. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000) (internal quotation marks omitted). "The court looks to the relief that [the plaintiffs] seek to determine whether their case has become moot." *Wightman-Cervantes v. Texas*, 2005 WL 770598, at *2 (N.D. Tex. Apr. 6, 2005) (Fitzwater, J.).

Plaintiffs ask the court to declare unconstitutional and to enjoin the Code's citizenship requirement, as applied to out-of-state retail permit holders. Defendants concede that S.B. 1229 has no effect on these requirements. Rather, they maintain that *Southern Wine* abrogates them and affords plaintiffs the relief they seek. The State has not appealed the *Southern Wine* decision, and it has committed to this court that it will not enforce the citizenship requirement in the future.

In *Southern Wine* Judge Yeakel of the Western District of Texas declared unconstitutional and enjoined the Code provisions that required the TABC to deny a permit to an applicant for failing to meet the one-year Texas residency and citizenship requirement. *S. Wine*, 486 F. Supp. 2d at 633 ("The Court concludes that Texas's one-year durational

residency and citizenship statutes fail Commerce Clause scrutiny[.]"). Defendants maintain that there is no indication that they will fail to abide by the injunction in *Southern Wine*, which they contend is sufficiently expansive to include the relief that plaintiffs seek here.

B

The court concludes that defendants have overlooked important differences between *Southern Wine* and the instant litigation, and that Judge Yeakel's decision does not render plaintiffs' claims moot.

First, the *Southern Wine* plaintiffs were out-of-state wine wholesalers who challenged TABC decisions to deny their applications for wholesale licenses based on the Code's one-year citizenship requirement. *Id.* at 628-29. Arguments presented in defense of the Code provisions, and rejected by the *Southern Wine* court, were specifically tailored to the statute's application to wholesalers rather than retailers.[9] *See id.* at 632 ("The one-year durational residency and citizenship statutes fail to pass constitutional muster because the TABC has failed in its burden to prove that no nondiscriminatory alternative means are available to Texas to address

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[9] In highlighting the retailer-wholesaler distinction, the court is not endorsing the view that retailers and wholesalers are materially different in relation to the Code's citizenship requirements. Instead, it is pointing out that there are components of the rationale for the *Southern Wine* decision that do not apply to retailers and thus distinguish that case.

the state's interest in ensuring that *those who distribute alcoholic beverages* have a stake in the welfare of the community in which they operate.") (emphasis added)).[10] There is no indication that the *Southern Wine* court considered possible justifications for applying the one-year residency and citizenship requirement to retailers as opposed to wholesalers. Thus *Southern Wine* is not sufficiently broad to cover retailers.

Second, unlike the plaintiffs in *Southern Wine*, who formed a Texas corporation to do business in Texas and "intend[ed] to operate facilities physically located in Texas," *id.* at 629, the retailer-plaintiffs in this litigation do not intend to become Texas residents or open stores in this state. Rather, they seek permits to sell wine at retail without becoming Texas residents. Thus while *Southern Wine* strikes down the one-year durational residence and citizenship requirement as unconstitutional, these plaintiffs seek a declaration that any citizenship requirement is unconstitutional, a question not addressed in *Southern Wine*. *See id.* at 633.

Although defendants commit not to enforce the Texas citizenship requirement, they offer no authority to suggest that this litigation-position would in all circumstances bind the State or the TABC. Accordingly, the court concludes that plaintiffs' constitutional challenges to the citizenship requirement is not moot.

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[10] The court equated distributors with wholesalers. *S. Wine*, 486 F. Supp. 2d at 628-29.

C

The court considers next the effect of the enactment of S.B. 1229 on this litigation.

Shortly before the summary judgment motions were filed in these cases, the Texas Legislature passed S.B. 1229, which circumscribes the shipping rights of in-state wine retailers.[11] Defendants contend that this amendment moots plaintiffs'

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[11] As amended, § 22.03(a) provides:

> The holder of a package store permit or wine only package store permit issued for a location within a city or town or within two miles of the corporate limits of a city or town, who also holds a local cartage permit, may make deliveries of and collections for alcoholic beverages off the premises in areas where the sale of the beverages is legal. The permittee must travel by the most direct route and may make deliveries and collections only within the county or the city or town or within two miles of its corporate limits, and only in response to bona fide orders placed by the customer, either in person at the premises, in writing, by mail, or by telegraph or telephone. This section shall not be construed as preventing a holder of a package store permit or wine only package store permit from delivering alcoholic beverages to the holder of a carrier's permit for transportation to persons who have placed bona fide orders and who are located in an area that the holder of a package store permit or wine only package store permit, who also holds a local cartage permit, is authorized to directly deliver to under this section. The holder of a package store permit or wine only package store permit may also deliver alcoholic beverages to the holder of a carrier's permit for transportation outside of this state in response to bona fide orders placed by persons authorized to purchase the beverages.

pleaded challenge to the pre-amendment direct-shipping provisions of the Code.[12]

Generally, "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed." *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004). There is an exception, however, when "there is evidence, or a legitimate reason to believe, that the state will reenact the statute or *one that is substantially similar*." *Id.* at 849 n.3 (emphasis added) (citing *City of Mesquite v. Aladdin's Castle, Inc* , 455 U.S. 283, 289 (1982); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)).

Prior to its amendment, § 22.03 of the Code allowed licensed retailers to ship alcoholic beverages to consumers statewide through the use of a common carrier. *See* Tex. Alco. Bev. Code § 22.03 (Vernon 2006) (amended Sept. 1, 2007) ("This section shall not be construed as preventing a [licensed retailer] ... from delivering alcoholic beverages to the holder of a carrier's permit for transportation to persons authorized to purchase the beverages); *id.* § 41.01 (providing that carrier permit holder may transport liquor into and out of Texas and between points within the state). Section 107.07(f) of the Code, however, precluded out-of-state entities (except wineries) from shipping wine to consumers within the state.

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[12] Defendants do not contend that plaintiffs' challenge to the *amended* version of § 22.03 is likewise moot.

> Except as provided by Chapter 54, any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident under this section is in violation of this code.

Tex. Alco. Bev. Code § 107.07(f) (recognizing that Chapter 54 of the Code authorizes direct retail sale and shipment of wine by out-of-state wine producers). Together, these provisions operated to enable retailers who were physically located in Texas to ship wine to residents throughout Texas, while denying that same right to out-of-state retailers. The recent amendment of § 22.03 circumscribes the shipping rights of an in-state retailer by forbidding it from shipping to a consumer outside the county in which the retailer is located. Amended § 22.03 does not, however, lift the ban on the sale and shipment of wine by out-of-state retailers to Texas residents.

The essence of plaintiffs' constitutional challenge to pre-S.B. 1229 law is that Texas has violated the dormant Commerce Clause by allowing in-state retailers to sell and ship wine to some Texas residents, but denying that same right to out-of-state retailers. Because current law, i.e., § 22.03 as amended by S.B. 1229, has the same alleged defects, it is "substantially similar" to the previous version and does not moot plaintiffs' constitutional challenge. *See Cooper v. McBeath*, 11 F.3d 547, 550-51 (5th Cir. 1994) (holding that Texas Legislature's amendment of Code, while case was on appeal, lowering citizenship requirement from three years to one year did not moot constitutional challenge to three-year

requirement). The fact that S.B. 1229 reduces the allegedly discriminatory advantage that in-state retailers have over their out-of-state counterparts does not moot the case, because "the [law's] practical effect remains the same: Plaintiffs, as non-Texans, are treated differently." *Id.* at 551. Thus there is more than a "'mere risk that [the Texas Legislature] will repeat its allegedly wrongful conduct; it has already done so.'" *Id.* at 550 (quoting *City of Jacksonville*, 508 U.S. at 662)).[13] The court concludes that plaintiffs' claims are not moot.

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[13] Defendants attempt to distinguish *Cooper* on the basis that the statutory amendment in *Cooper* occurred while the case was on appeal, not before the district court rendered judgment. But nothing in *Cooper*, *McCorvey*, or *City of Jacksonville* indicates that the substantially-similar-amendment principle applies only to cases in which the amendment occurs while the case is on appeal.

Defendants also cite *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Texas*, 421 F.3d 314 (5th Cir. 2005), in which the Fifth Circuit held that the city's ordinance amendment—enacted prior to the district court's judgment—rendered moot the plaintiffs' constitutional challenge to the pre-amendment ordinances. In that case the amended ordinance materially altered the prior ordinances, and the plaintiffs did "not contend that ... [the amended ordinance was] itself unconstitutional, just that the City [could not] be trusted not to repeal [the amendment and restore the offending ordinances]." *Id.* at 321-22 (rejecting challenge on grounds that there was "nothing whatever to suggest that the City intend[ed] to [restore the offending ordinances] when th[e] case [was] over"). The present case is distinguishable. Texas has adopted an amended statute that is substantially similar to the prior version and, as the court will explain, is unconstitutional when applied to out-of-state wine retailers.

IV

In addition to challenging the pre-S.B. 1229 version of Texas law, the Siesta Village plaintiffs maintain that the Code as amended is unconstitutional. They assert this challenge for the first time in their response to defendants' motion for summary judgment and in reply in support of their own summary judgment motion. The court must decide whether it can now consider this new claim for relief.

A

1

When a party raises arguments outside the scope of its pleadings, the court construes the arguments as an implicit motion for leave to amend. *See Ganther v. Ingle*, 75 F.3d 207, 211-12 (5th Cir. 1996) (per curiam); *Sherman v. Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972). When the deadline to amend pleadings has expired, a court considering a motion to amend must first determine whether to modify the scheduling order under the Fed. R. Civ. P. 16(b)(4) good cause standard.[14] *See S & W Enters., L.L.C. v. SouthTrust Bank of Ala., N.A.*, 315 F.3d 533, 536 (5th Cir. 2003); Am. *Tourmaline Fields v. Int'l Paper Co.*, 1998 WL 874825, at *1 (N.D. Tex. Dec. 7, 1998) (Fitzwater, J.). If the movant satisfies the requirements of Rule 16(b)(4), the court must next

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[14] The restyled Federal Rules of Civil Procedure took effect December 1, 2007. The good cause standard is now found in Rule 16(b)(4), which states that "[a] schedule may be modified only for good cause and with the judge's consent."

determine whether to grant leave to amend under the more liberal standard of Rule 15(a)(2), which provides that "[t]he court should freely grant leave given when justice so requires." Rule 15(a)(2); *S & W Enters.*, 315 F.3d at 536; *Am. Tourmaline Fields*, 1998 WL 874825, at *1.

The court assesses four factors when deciding whether to grant an untimely motion for leave to amend. *S & W Enters.*, 315 F.3d at 536. First, the court considers the reason for the untimeliness. *Id.* The statutory changes at issue here were enacted on May 25, 2007, well after the January 4, 2007 deadline for seeking leave to amend pleadings, and only four days before the Siesta Village plaintiffs filed their first summary judgment motion. They lacked any opportunity to seek leave to amend before the court-ordered deadline.

The second factor pertains to the importance of the amendment. *Id.* The parties have filed approximately 20 briefs in litigating their respective summary judgment motions, and the court has heard two hours of oral argument. Defendants have relied heavily on the amended version of § 22.03 for their defense, expending considerable effort to support its constitutionality. Likewise, both sets of plaintiffs have vigorously attacked it.[15] Determining the constitutionality of the amended version of § 22.03 is

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[15] Although the Wine Country plaintiffs prefer that the court focus solely on the pre-amendment version of the statute without considering the amended version, they have also advanced ample argument regarding the amended statute's unconstitutionality.

vitally important to this case, because without doing so, it will be impossible to decide one of its central issues: whether out-of-state retailers may sell and ship wine to Texas residents.

The third and fourth factors involve evaluating the potential for prejudice and the availability of a continuance to cure such prejudice. *Id.* There is little or no potential for prejudice here, because the parties have had a fair opportunity to brief thoroughly the constitutionality of the amended version of § 22.03. No party will have been deprived of a reasonable opportunity to raise available arguments.

The court therefore concludes that all the relevant Rule 16(b)(4) factors favor granting leave to amend. The court discerns no compelling reason to deny granting leave under the more liberal Rule 15(a)(2) standard. Accordingly, treating the Siesta Village plaintiffs' summary judgment briefing as a motion for leave to amend, the court grants the motion.

B

For similar reasons, the fact that the Siesta Village plaintiffs did not challenge § 22.03 in their summary judgment motion does not prevent the court from reaching the merits of the claim. This court has previously declined to consider grounds for summary judgment that were not raised in a party's motion and opening brief. *E.g.*, *Jacobs v. Tapscott*, 2006 WL 2728827, at *7 (N.D. Tex. Sept. 25, 2006) (Fitzwater, J.) ("[T]he court will not consider an argument raised for the first time in a reply brief." (quoting *Senior Unsecured Creditors' Comm. of First RepublicBank Corp. v. FDIC*, 749 F. Supp. 758, 772

(N.D. Tex. 1990) (Fitzwater, J.)), *appeal docketed*, No. 07-10558 (5th Cir. May 22, 2007). But the court retains the discretion to consider such an argument. *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005). "Rule 56(c) merely requires the court to give the non-movant an adequate opportunity to respond prior to a ruling." *Vias Arms, Inc. v. Vias*, 383 F.3d 287, 292 (5th Cir. 2004) (internal quotation marks omitted).

Unlike prior cases in which the court has declined to consider arguments raised for the first time in reply, all parties to this case have been able to thoroughly brief, and orally argue, the ground of relief that the Siesta Village plaintiffs assert for the first time in their response and reply briefs. Consequently, reaching the merits will not deprive any opposing party of an adequate opportunity to respond. The court will therefore address the Siesta Village plaintiffs' constitutional challenge to § 22.03, as amended by S.B. 1229.

V

Having disposed of the preliminary questions presented, the court now turns to the merits of plaintiffs' dormant Commerce Clause challenges to the Code.

A

The Constitution grants Congress the power to "regulate Commerce ... among the several States[.]" U.S. Const. art. I, § 8, cl. 3. This affirmative grant of power implies a "negative" or "dormant" constraint on state regulatory authority. *E.g., Dennis v. Higgins*, 498 U.S. 439, 447 (1991); *John Havlir & Assocs., Inc. v. Tacoa, Inc.*, 810 F. Supp. 752, 754-55

(N.D. Tex. 1993) (Fitzwater, J.). "'[T]his negative aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dickerson v. Bailey*, 336 F.3d 388, 395 (5th Cir. 2003) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

A statute implicates the dormant Commerce Clause if it discriminates against interstate commerce "either facially, by purpose, or by effect." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007); *see also John Havlir & Assocs.*, 810 F. Supp. at 755. The statute's challengers bear the initial burden of establishing discrimination. *Allstate*, 495 F.3d at 160. If they carry this burden, the statute will be deemed valid only if the state shows that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (internal quotation marks omitted); *see also John Havlir & Assocs.*, 810 F. Supp. at 755. A statute that does not discriminate is valid unless the burden imposed on interstate commerce is "clearly excessive" in relation to the putative local benefits. *Allstate*, 495 F.3d at 160 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *John Havlir & Assocs.*, 810 F. Supp. at 755.

These principles apply with equal force to the regulation of alcohol, notwithstanding the adoption of § 2 of the Twenty-first Amendment.[16] *Granholm*,

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[16] U.S. Const. amend. XXI, § 2:

544 U.S. at 486 ("[T]he Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers."). The Twenty-first Amendment merely "restored to the States the powers they had" before Prohibition, and served to "constitutionaliz[e] the Commerce Clause framework" that was in existence at that time. *Id.* at 484. The states were never authorized to discriminate against interstate commerce with respect to alcohol regulations, and the Twenty-first Amendment did not create any new rights to do so. *Id.* at 484-85.

B

The threshold question in any dormant Commerce Clause analysis is whether the entities between whom the state purportedly discriminates are "similarly situated." Unless they are, there can be no violation of the dormant Commerce Clause. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). Two or more entities are similarly situated when there exists "actual or prospective competition between the supposedly favored and disfavored entities in a single market." *Id.* at 300.

> [If] the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden

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> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

> were removed ... eliminating the ... regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.

Id. at 299.

Glazer and Republic maintain that the retailer-plaintiffs are not similarly situated to the in-state retailers with whom they attempt to compare themselves. They posit that out-of-state retailers are not potential competitors with in-state retailers because Texas has a Twenty-first Amendment right to exclude from competition any retailer who does not participate in its three-tier system. This argument misunderstands the purpose of the "similarly situated" inquiry.

At this stage of the analysis, the court does not consider whether Texas' exclusion of out-of-state entities from competition is *justified*. The court addresses this question later, when it determines whether the exclusion is evenhanded and/or necessary to achieve legitimate state objectives. *See Allstate*, 495 F.3d at 160. At the present analytical stage, the court asks only whether, absent Texas' legal barriers to entry, in-state and out-of-state retailers would be in competition. *See Gen. Motors*, 519 U.S. at 298-300. Because the retailer-plaintiffs and in-state wine retailers are engaged in the same business—the sale of wine to retail consumers—and seek access to the same market—Texas consumers—they are potential competitors and are therefore

similarly situated for purposes of dormant Commerce Clause analysis.

C

Having determined that out-of-state wine retailers are similarly situated to in-state retailers, the court now considers whether Texas law discriminates against out-of-state wine retailers.

1

As described above, the pre-amendment form of Texas law gave wine retailers who were physically located in Texas the right to ship wine to residents throughout Texas, while denying that right to out-of-state retailers. *See supra* § III(C). Such laws plainly discriminate against interstate commerce. *See Granholm*, 544 U.S. at 474-75 (invalidating laws that required wine producers to establish branch offices or warehouses within state before shipping in in-state commerce, reasoning that physical presence requirements drive up cost of doing business for out-of-state producers, and viewing with "particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere." (internal quotation marks omitted)). Physical presence requirements "run[ ] contrary to [the Supreme Court's] admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms." *Id.* at 475 (internal quotation marks omitted).

The recent amendment of § 22.03 restricts the rights of in-state retailers, but it nevertheless perpetuates the discriminatory regime applied to out-of-state retailers. Amended § 22.03 gives wine

retailers located within a Texas county the right to sell and ship wine to consumers within that county. Out-of-state wine retailers cannot sell or ship wine to any Texas consumers at all.

2

The arguments that defendants and intervenors advance in support of the Code's constitutionality are unavailing.

Initially, Glazer and Republic appear to suggest that the law is evenhanded because it gives *all* retailers the right to sell and ship to consumers in their respective counties, regardless whether they are inside or outside the state. In other words, they posit that, just as a wine retailer located in Texas can sell wine at retail in the Texas county in which it is located, a California wine retailer can sell wine within the county *in California* in which it is located. The relevant inquiry for purposes of dormant Commerce Clause analysis, however, is whether a state discriminates between in-state and out-of-state interests with respect to access to *in-state markets*. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) ("Th[e] negative aspect of the Commerce Clause prohibits economic *protectionism* ....") (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)) (emphasis added) (internal quotation marks omitted). The Code facially discriminates in this respect, giving in-state wine retailers access to the direct-shipping markets of their respective counties, while denying the same access to out-of-state wine retailers.

Next, defendants maintain that the right to ship within only a single Texas county is too small an advantage to local retailers for the law to be

discriminatory, and that the court should focus instead on whether the Code treats in-state and out-of-state interests equally with respect to the right to ship *statewide*. The court disagrees.

The in-state retailers' right to ship within their respective counties of location confers greater benefits than defendants appear to acknowledge. Nothing in the law prevents in-state retail chains with brick-and-mortar locations in multiple counties from shipping to consumers within each such county, provided they ship within the county. Out-of-state retailers have no access to any of these markets. Moreover, even a retailer located within a single Texas county may have a substantial economic advantage over an out-of-state counterpart. For example, several million people (many of whom are of drinking age) reside in Harris County, whose population exceeds that of 24 states. *See* U.S. Census Bureau, 2006 Population Estimates, http://www.census.gov. Although a Harris County retailer would have access to this market, an out-of-state retailer would not.[17]

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[17] Under Supreme Court precedent, it is of no moment that this right is also denied to other in-state retailers (i.e., those located in other counties). *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 355, 361 (1992) (invalidating state law that prohibited landfill operators from accepting solid waste that originated outside county in which their facilities were located, whether or not waste came from outside the state) ("[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.")).

And it makes no difference how limited the shipping advantage is for in-state retailers. "[T]here is no '*de minimis*' defense to a charge of discriminat[ion]." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 n.15 (1997) (internal quotation marks omitted). "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994). A law that relies on the requirement of a physical, in-state location to afford some retailers the right to sell and ship wine to Texas consumers, while denying the same right to others who are located out-of-state, is therefore constitutionally suspect, regardless whether that right expands to the entire state or is restricted to a single county. *See id.* The cases that defendants cite involved evenhanded statutes and actually highlight the reasons why the challenged Code provisions are discriminatory. *See Brooks v. Vassar*, 462 F.3d 341, 354-55 (4th Cir. 2006) (upholding personal importation exception to Virginia's requirement that all alcohol be sold through three-tier system because it "[was] not economic protectionism ... [but] actually amount[ed] to disadvantage *local* wineries whose wine may only be purchased through [the three-tier system]" (emphasis added)); *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 613-14 (W.D. Ky. 2006) (sustaining exception to state's otherwise

absolute prohibition on direct shipment on grounds that it was made available to *both* in-state and out-of-state entities).[18]

Defendants also contend that a system designed only to ensure "close proximity transactions" cannot be discriminatory. They rely on a handful of post-*Granholm* decisions that sustain state requirements that all wine sales be made through "face to face" transactions. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35 (1st Cir. 2007); *Jelovsek v. Bresden*, 482 F. Supp. 2d 1013, 1022 (E.D. Tenn. 2007); *Hurley v. Minner*, 2006 WL 2789164, at *6 (D. Del. Sept. 26, 2006). Defendants' reliance on these cases is misplaced, because their holdings were based expressly on the fact that the challenged statutes involved evenhanded prohibitions of *all* direct shipping, foreclosing the direct-shipping market to everyone on equal terms. *See Cherry Hill*, 505 F.3d at 35 ("[*Granholm* is distinguishable because] Maine flatly outlaws any and all direct shipping of wine.... [T]here is no direct-shipping market; neither in-state nor out-of-state wineries may direct-ship."); *Jelovsek*, 482 F. Supp. 2d at 1022 ("'Tennessee, by prohibiting [all] shipping ... creates no specially advantageous State market which is

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[18] In one of their reply briefs, defendants recast their "de minimis defense" as an argument that the court should look only at substantive, rather than nominal, distinctions between in-state and out-of-state entities. Because the substantive effect of the Code provisions in question is to deny out-of-state retailers access to the direct-shipping market enjoyed by in-state retailers, defendants' change in terminology does not warrant a different result.

then available only to State residents."); *Hurley*, 2006 WL 2789164, at *6 ("The key fact in the case at bar is that ... neither in-state nor out-of-state wineries are allowed to deliver wine directly to Delaware residents' homes."). If the challenged statutes had, like those here, "created a direct-shipping market for wine[,] ... allowed direct shipping on particular conditions, and those conditions were rigged to favor in-state wineries," they would have been unconstitutional. *Cherry Hill*, 505 F.3d at 35 (holding that these characteristics distinguished statutes at issue in *Granholm* from those requiring face-to-face transactions). The cases do not, as defendants suggest, endorse a special interest in "close proximity" transactions.

In a related argument, defendants assert that out-of-state wine retailers' inability to ship to consumers in Texas is a mere practical consequence of their remoteness from the state, rather than a result of discrimination. The court disagrees. Although an inability to sell wine to Texas consumers in *face-to-face* transactions could be called a practical consequence of a remote location, nothing about a remote location makes it practically impossible to sell *by mail or common carrier*. The inability to ship by mail or common carrier is in fact a *legal* consequence of plaintiffs' remoteness from the state—one that warrants heightened scrutiny under the dormant Commerce Clause.

D

Because plaintiffs have established that the challenged provisions of the Code discriminate against interstate commerce, the "burden [now shifts to] the State to show that the discrimination is

demonstrably justified." *Granholm*, 544 U.S. at 492 (emphasis and internal quotation marks omitted). Defendants must demonstrate that the challenged statutes advance a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (internal quotation marks omitted). "The [c]ourt [may uphold] state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 492-93.

1

Defendants contend that requiring the in-state presence of wine retailers is necessary for protecting Texas' interest in conducting on-site inspections of retailer premises. Acknowledging that the Supreme Court found this interest to be insufficient to justify the discrimination at issue in *Granholm*, *id.* at 492, defendants maintain that the present case is distinguishable because they have developed a superior factual record. The court disagrees.

Although the *Granholm* Court did cite the states' inability to provide a concrete record as a reason for rejecting the proposition that direct shipping circumvents the laws governing underage drinking, it did not rely on this reason to reject the states' proffered interest in on-site inspections. *Compare id.* at 490 ("Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions.") *with id.* at 492 ("These [on-site inspection] objectives can also be achieved through the alternative of an evenhanded licensing requirement .... [I]t should be noted that

improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail."). Summarizing its holding that physical presence requirements do not advance objectives unattainable by other means, the Court reiterated the lack of record evidence, but this statement was only a "summary" of its previous points and did not provide additional grounds for rejecting the states' proffered need for on-site inspections. *Id.* at 492. Even if the states did in fact fail to support their factual assertions about on-site inspections with an evidentiary record, the Court appears to have assumed *arguendo* the truth of these assertions and found them to be insufficient nonetheless, because this was its approach to the unsupported underage drinking arguments. *See id.* at 490 ("Even were [the Court] to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments."). Because defendants do not specify any rationale for on-site inspections that would not have been considered by the Court in *Granholm* or foreclosed by its reasoning, this justification fails in the present litigation.

2

The court also finds insufficient the grounds that Glazer and Republic advance in support of the discriminatory treatment of out-of-state retailers.

The first of these is that Texas' ban on direct shipping is necessary to prevent access by minors to alcohol. In rejecting this justification for

discriminatory direct-shipping laws, the *Granholm* Court noted that a "less restrictive step[ ]" to accomplish this objective would be to "require[ ] an adult signature on delivery and a label so instructing on each package." *Id.* at 490-91. Glazer and Republic contend that this alternative would sometimes allow minors to gain access to alcohol (e.g., by a deliveryman's failure to properly verify age), but they offer no evidence that the system is less effective at policing underage drinking than the other methods. Therefore, preventing access to alcohol by minors does not justify Texas' discriminatory direct-shipping laws.

Glazer and Republic's second contention is that the statutes are necessary for achieving Texas' revenue-raising interest. But although Glazer and Republic offer some evidence that Texas has had difficulty collecting taxes on Internet sales generally, they adduce no proof that Texas would encounter difficulty collecting taxes in the context of alcohol sales, where it "could protect itself ... by requiring a permit as a condition of direct shipping." *Granholm*, 544 U.S. at 491 (citing this less-restrictive alternative as reason to reject states' revenue-raising justification). The absence of such evidence is fatal to their argument.

Glazer and Republic contend, third, that a ban on direct shipping by out-of-state wine retailers is necessary to preserve Texas' three-tier system, because lifting the restriction would allow wine to enter Texas that had not been funneled through a TABC-licensed wholesaler. As the court explains *infra* at § VI(A)(3), however, Texas can constitutionally require that wine sold and shipped

to Texas consumers be purchased from a Texas-licensed wholesaler. The court therefore disagrees that the sale and direct shipment of wine would necessarily allow out-of-state retailers to bypass the three-tier system.[19]

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[19] The court recognizes that this conclusion differs from the recent decision in *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (S.D.N.Y. 2007). The *Arnold's Wines* court concluded, based on the Twenty-first Amendment alone, and without conducting a dormant Commerce Clause analysis, that New York had the right to preclude out-of-state wine retailers from selling, delivering, and transporting wine directly to New York consumers because the ban was "an integral part of the three-tier system upheld by the Supreme Court in *Granholm*." *Id.* at 413-14. The court stated, in pertinent part, that "[b]ecause in-state retailers are the last tier in the State's three-tier system, plaintiffs' challenge to the[law's] provisions blocking out-of-state entities from obtaining licenses to compete at this tier is clearly an attack on the three-tier system itself." *Id.* at 411. The court respectfully disagrees with *Arnold's Wines*, concluding, *inter alia*, that it is based on a misreading of *Granholm*, and that it elevates a state's rights under the Twenty-first Amendment to a level that improperly supersedes the dormant Commerce Clause. *Granholm* states, for example, that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. The laws in question in *Arnold's Wines* do not appear to satisfy that requirement. *Arnold's Wines*, 515 F. Supp. 2d at 402 (addressing laws "that reserve to in-state retailers the exclusive right to sell, deliver, and transport wine directly to New York consumers"). Moreover, as the court explains in today's opinion, a state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system. Therefore, it does not follow that allowing out-of-state retailers to compete in a state's domestic market "is clearly an attack on the three-tier system itself." *Id.* at 411.

3

For the foregoing reasons, the court concludes that defendants have failed to establish that Texas' discriminatory direct-shipping laws are necessary to achieve a legitimate state interest. The court therefore holds that the following Code provisions are unconstitutional as applied to out-of-state wine retailers: Tex. Alco. Bev. Code §§ 22.03[20], 24.03, 54.12, and 107.07(f).[21]

E

Based on the foregoing, it follows that the challenged Texas citizenship requirements[22] are also unconstitutional as applied to retailers. If Texas cannot constitutionally condition wine retailer direct-shipping rights on a physical presence within the state, it cannot condition qualification for TABC permits on establishing citizenship in Texas. It also follows that Texas cannot prohibit consumers from purchasing wine from out-of-state retailers who comply with the Code and TABC regulations. Accordingly, the challenged ban on consumer imports of wine embodied in §§ 107.05(a) and 107.07(a) is also unconstitutional.

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[20] This holding applies to pre-S.B. 1229 law, as well.

[21] The Siesta Village plaintiffs include § 110.053 in their list of challenged statutes, but the court neither perceives, nor do plaintiffs identify, any defect in this provision.

[22] These requirements are set out in Tex. Alco. Bev. Code §§ 6.03, 11.46(a)(11), 11.61(b)(19), 24.01(c), and 109.53. Sections 24.01(c) and 109.53 are implicated with respect to the provisions that incorporate a citizenship requirement.

VI

The court now decides the scope of the relief to which plaintiffs are entitled.

A

Plaintiffs request that the Agreed Injunction be made permanent, or that the court substitute its own injunction giving the retailer-plaintiffs the right to sell and ship wine directly to consumers within Texas. Defendants respond that this relief would improperly allow the retailer-plaintiffs to do business in the state without obtaining TABC permits or complying with the requirement that they purchase wine from a TABC-licensed wholesaler. The Wine Country plaintiffs maintain that this is justified because there are no TABC permits available to out-of-state retailers, the Code's wholesaler-purchase requirement is inapplicable to out-of-state retailers, and, if the wholesaler-purchase requirement in fact applies to out-of-state retailers, it is unconstitutional.

1

Texas law requires that any person who seeks to sell alcohol within the state must first obtain a TABC license or permit. *See* Tex. Alco. Bev. Code §§ 6.01, 11.01. The Wine Country plaintiffs contend that it would be unconstitutional to apply this requirement to them because there are no permits available to out-of-state retailers. They reason that, because the Texas Legislature has not created a special licensing scheme for out-of-state retailers, as it recently has done for out-of-state wineries, *see* Tex. Alco. Bev. Code §§ 54.01-54.12 (effective May 1, 2005), out-of-state retailers are excluded from

participating in Texas' three-tier system. The court disagrees.

The State's mechanism for excluding out-of-state wine retailers from the Texas market is found in the unconstitutional citizenship requirements. Because the court is enjoining enforcement of the citizenship requirements against out-of-state wine retailers, no enforceable Code provisions prevent the retailer-plaintiffs from obtaining TABC permits. The fact that the remaining, constitutional components of the Texas regulatory scheme may be somewhat awkward when applied to out-of-state wine retailers does not require that the Texas Legislature enact a separate system that regulates them. Accordingly, the court holds that the retailer-plaintiffs must first obtain TABC permits before selling and shipping wine to consumers within Texas.

2

The court also holds that the retailer-plaintiffs must purchase from TABC-licensed wholesalers and wineries the wine they sell to consumers within Texas. This requirement is plainly imposed by the Code. *See* Tex. Alco. Bev. Code Ann. §§ 22.01 and 24.01 (Vernon 2007). The Wine Country plaintiffs contend that this requirement does not apply to them. They emphasize that it has never been enforced against out-of-state retailers, and they assert that the made-for-litigation interpretation of the law that defendants now advance is entitled to no deference under principles articulated in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988), and *Thompson v. Goetzmann*, 337 F.3d 489, 502 (5th Cir. 2003).

Bowen and *Thompson* do not affect the court's conclusion that the wholesaler-purchase requirement applies to the retailer-plaintiffs. The court is not deferring to the TABC's interpretation of the Code. It is itself interpreting unambiguous statutory provisions. The court therefore concludes that the Code requires the retailer-plaintiffs to purchase from TABC-licensed wholesalers the wine they seek to sell at retail to consumers in Texas.

3

The Wine Country plaintiffs contend that the requirement that they purchase wine for resale from Texas-licensed wholesalers is unconstitutional because it effectively requires their physical presence in Texas. They maintain that California law forbids them from receiving shipments of alcohol from out-of-state wholesalers into the state, which means that to comply with Texas' wholesaler-purchase requirement, they must establish a Texas branch office to receive shipments. The court rejects these arguments.

A decision like today's that invalidates components of a state's direct-shipment laws does not necessarily call into question the constitutionality of the state's three-tier system. *See Granholm*, 544 U.S. at 488. The Supreme Court noted in *Granholm* that it had "previously recognized that the three-tier system itself is 'unquestionably legitimate.'" *Id.* at 489 (citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990), and *id.* at 447 (Scalia, J., concurring in judgment)). It cited in support of this conclusion Justice Scalia's concurrence in *North Dakota*, in which he wrote: "The Twenty-first Amendment ... empowers North

Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447. And the Court concluded that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489.

In requiring that wine retailers purchase their wine for resale from Texas-licensed wholesalers, the Code does not treat in-state retailers more favorably than it does out-of-state retailers. *See* Tex. Alco. Bev. Code Ann. §§ 22.01 and 24.01 (Vernon 2007). In fact, the Code does not contemplate that there will be any wine sales by out-of-state retailers to consumers in Texas. Although a state may not exempt in-state interests from the strictures of its three-tier system while continuing to require out-of-state interests to comply with it, *see, e.g., Granholm*, 544 U.S. at 489, this is not the case here. As a result of today's decision, out-of-state retailers are now eligible to obtain permits to sell and ship wine to Texas consumers.[23] As permittees, they become subject to Code provisions that are part of the three-tier system and that make no distinction between out-of-state and in-state entities.

Nor can the Wine Country plaintiffs avoid this result based on complaints about the practical consequences of imposing the wholesaler-purchase requirement. If, as is undoubtedly true, Texas can "funnel sales through the three-tier system," *id.*, it

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[23] The Agreed Injunction had this effect, of course, but it afforded only temporary relief.

can impose the wholesaler-purchase requirement of that system on both in-state and out-of-state wine retailers. In fact, the Fourth Circuit suggested in *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), that one way to remedy a scheme that discriminated against out-of-state wine manufacturers—who were required to sell through the three-tier system when in-state wine manufacturers were not—was for the state to "require in-state wines to pass through the same three-tiered scheme that all other wines must pass through." *Id.* at 515. This is the effect of the Code's wholesaler-purchase requirement in combination with today's decision enabling out-of-state wine retailers to sell to consumers in Texas: the wholesaler-purchase requirement applies to in-state and out-of-state interests alike. *See Granholm*, 544 U.S. at 489 ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."). The Texas wholesaler-purchase requirement is therefore constitutional as applied to out-of-state wine retailers who desire to sell and ship wine to Texas consumers.

4

The Wine Country plaintiffs also argue that Texas does not require that "all" liquor pass through the three-tier system, but has instead made an exception for direct sales by wineries to consumers. Assuming *arguendo* that, at some point, exceptions to the three-tier system—even if equally applied to out-of-state interests—can become sufficiently expansive that they cause the State to lose its right to regulate through that system, this is not such a case. The limited exception afforded under the Code

for direct sales by wineries does not permit the conclusion that Texas has relinquished its right to regulate the vast remainder of wine sales through its three-tier system.

The Fourth Circuit's decision in *Brooks* lends support to this conclusion.[24] In affirming the state's right to employ the three-tier system, the court repeatedly acknowledged the existence of other exceptions to that arrangement, including one for direct sales to consumers by wine producers. *Brooks*, 462 F.3d at 345, 349, 350 n.2 (maj. op.); *id.* at 352 n.3 (Niemeyer, J., concurring). Significantly, the existence of these exceptions did not affect the court's conclusion that Virginia could require that all other alcohol sales be made through the three-tier system. The state's interest in using that system apparently had not been undermined.

The court therefore concludes that Texas has not relinquished its interest in the three-tier system by making a limited exception for direct sales by wineries.

5

Finally, plaintiffs' arguments criticizing the three-tier system are—to the extent the regime is constitutional—more appropriately directed to the Texas Legislature. *See, e.g., Ewing v. California*, 538

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[24] *Brooks* was written by Judge Niemeyer. Judge Traxler concurred in the opinion except as to Part III(B), and he concurred in the judgment. Judge Goodwin concurred in Parts I, II, and V, and dissented from Parts III and IV. *Brooks*, 462 F.3d at 344.

U.S. 11, 28 (2003) ("[Federal courts] do not sit as a 'superlegislature' to second-guess [state] policy choices."). Similarly, it is not controlling that some of the policy rationales for making exceptions for wineries might support a decision to craft similar exceptions for retailers, because plaintiffs do not contend that they are constitutionally entitled to the same treatment as are wine producers.

B

Because the retailer-plaintiffs may not sell and ship wine to Texas consumers without first obtaining TABC permits or purchasing their wine from a Texas-licensed wholesaler, they are not entitled to injunctive relief that enables them to circumvent these requirements. The court must instead fashion a remedy that relieves them only from complying with the unconstitutional provisions of the Code. Accordingly, the court enjoins enforcement of the Code's Texas citizenship requirements as applied to out-of-state wine retailers, and it enjoins enforcement of the ban on imports as applied to Texas consumers who seek to purchase wine from out-of-state retailers, and as applied to entities who would be barred by its provisions from delivering wine to Texas consumers.

As to the direct-shipping laws, there is some dispute about the appropriate scope of the injunction. Plaintiffs request that the court enjoin enforcement of only those provisions that prohibit out-of-state retailers from shipping wine to Texas consumers. By contrast, Glazer and Republic argue that the court should nullify the direct-shipping rights currently enjoyed by in-state retailers, rather than extending those benefits to out-of-state retailers. Defendants,

for their part, appear to prefer a remedy that would allow out-of-state interests to sell and ship wine only to a single Texas county.

Two basic principles guide the court's resolution of this dispute. First, mindful of its institutional role, the court must resist invitations to engage in legislative policymaking. *See, e.g., Ewing*, 538 U.S. at 28 ("[Federal courts] do not sit as a 'superlegislature[.]'"); *Dickerson*, 336 F.3d at 408-409 ("We must decline the ... invitation to assume the mantle of super legislature, actively rewriting substantial portions of the [Code] under the guise of validating a Commerce Clause challenge.") (invalidating statutory regime that afforded direct sale and shipment rights exclusively to in-state wineries).

Second, discriminatory direct-shipping laws should be cured by extending rights to out-of-state retailers rather than by increasing restrictions on in-state retailers. *See Dickerson*, 336 F.3d at 407-09 (enjoining enforcement of statutory provisions that denied shipping rights to out-of-state wineries rather than eliminating provisions that granted such rights to in-state wineries) ("[T]he extension of benefits, not the extension of burdens—is [the goal] inherent in a claim under the Commerce Clause.... [A] Commerce Clause claim can only be redressed in the form of *eliminating* discriminatory *restrictions* that have been imposed on out-of-state interests.") (emphasis in original)).[25]

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[25] Glazer and Republic maintain that the court should follow the Fourth Circuit's contrary holding in *Beskind*, 325

Applying these principles, the court enjoins enforcement of §§ 54.12 (generally forbidding out-of-state entities from shipping to Texas consumers) and 107.07(f) (same) as applied to out-of-state wine retailers. It also enjoins, as applied to out-of-state wine retailers, the enforcement of the in-county shipping limitation found in §§ 22.03 and 24.03.[26] The Agreed Injunction is hereby dissolved and is replaced by the more limited injunctive relief set out in the judgment filed today.[27]

F.3d at 519. They do not, however, provide any basis for distinguishing *Dickerson*, which is binding in this circuit.

[26] While the court recognizes that enjoining §§ 22.03 and 24.03 only as to out-of-state wine retailers results in statewide shipping rights for out-of-state retailers without a concomitant expansion of statewide shipping rights for in-state wine retailers, the in-county shipping limitation has not been deemed unconstitutional as applied to Texas retailers, so it would be improper for the court to enjoin its enforcement as to them. *See Dickerson*, 336 F.3d at 407 (enjoining enforcement of unconstitutional direct-shipping laws only as applied to out-of-state wineries, which was the only application held to be unconstitutional); *United States v. Faasse*, 265 F.3d 475, 487 n.10 (6th Cir. 2001) (recognizing that wholesale invalidation of statute "is reserved only for when there are no set of circumstances in which the statute's application would be constitutional").

[27] In view of this disposition, the court denies intervenors' April 26, 2007 motion to dissolve the Agreed Injunction as moot.

VII

Finally, the court turns to Glazer's and Republic's counterclaims against plaintiffs and cross-claim against Steen.

A

Glazer's and Republic's counterclaims and cross-claim consist of three counts. In count I, intervenors complain that the Agreed Injunction and plaintiffs' requested relief violates Texas' three-tier system, compromises Glazer's and Republic's business interests and customer relationships, gives an unregulated class of out-of-state importers an unfair competitive advantage, and creates a discriminatory preference for wine over other alcoholic beverages. They allege that they are being deprived of their right and privilege to engage in interstate commerce under the three-tier system. And they aver that the Agreed Injunction violates their rights under the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment by preferring one form of interstate commerce over another, and by depriving them of the evenhanded and nondiscriminatory application and administration of state law.

In count II, Glazer and Republic request a judgment declaring the rights and duties of plaintiffs, defendants, and intervenors. They also ask the court to declare that the challenged Code sections are constitutionally valid provisions of the three-tier system, that out-of-state retailers must purchase alcohol from Texas in-state, licensed wholesalers, and that enforcement of these requirements against out-of-state retailers like plaintiffs is constitutional.

In count III, intervenors aver that any different treatment imposed by Texas law on the manner in which wine is sold by licensed retailers to Texas consumers is constitutional and/or immunized from Commerce Clause scrutiny by the Twenty-First Amendment and/or the Webb-Kenyon Act, 27 U.S.C. § 122. They request that, if the court determines that any portion of the Code is unconstitutional, it limit the remedy to eliminating only those elements that constitute unconstitutional discrimination, while expressly declaring the continuing validity of the other Code provisions that plaintiffs challenge.

In their prayer for relief, Glazer and Republic request, in pertinent part,[28] that the court deny the relief that plaintiffs request, and that it enter judgment against plaintiffs, vacate the Agreed Injunction, and declare that the challenged Code provisions are constitutional and that alcohol must pass through a licensed, in-state Texas wholesaler before it can be sold at retail to Texas consumers. Alternatively, they ask that, if the court determines that the Code is in any respect unconstitutional, it enter limited injunctive relief that addresses these infirmities rather than order the expansive remedies that plaintiffs seek.

B

In the exercise of its discretion, the court dismisses Glazer's and Republic's claims for declaratory judgment relief. Because, in the context

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[28] An example of the other relief they request is a right of limited discovery in this litigation.

of plaintiffs' claims, the court has fully considered and addressed the issues and arguments that Glazer and Republic present, addressing the claims anew in the context of a declaratory judgment counterclaim and cross-claim would be wholly redundant. The court therefore denies the requested relief. *See, e.g., Kougl v. Xspedius Management Co. of Dallas/Fort Worth, L.L.C.*, 2005 WL 1421446, at *4 (N.D. Tex. June 1, 2005) (Fitzwater, J.) (exercising discretion to dismiss declaratory judgment counterclaim on grounds that it raised issues already presented in lawsuit).

C

Glazer and Republic also seek declaratory relief and vacatur of the Agreed Injunction based on alleged violations of their rights under the dormant Commerce Clause and the Equal Protection Clause.

As the court has already explained, the dormant Commerce Clause operates to forbid "economic *protectionism*—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming*, 502 U.S. at 454 (quoting *New Energy Co.*, 486 U.S. at 273-74) (emphasis added) (internal quotation marks omitted). Glazer and Republic cite no authority for the proposition that the dormant Commerce Clause is implicated where a state grants preferential treatment to *out-of-state* interests. The court therefore dismisses intervenors' Commerce Clause claim.

The claim that Glazer and Republic bring for violating their rights under the Equal Protection Clause also fails. They make no attempt to demonstrate that they are similarly situated to the

entities who they contend are receiving preferential treatment. This is fatal to their claim. *See, e.g., Beeler v. Rounsavall,* 328 F.3d 813, 816 (5th Cir. 2003) ("[Under] standard equal protection analysis ... the plaintiff must [first] prove that similarly situated [entities] were treated differently.") (internal quotation marks omitted)). Accordingly, the court dismisses with prejudice the counterclaims and cross-claim of Glazer and Republic.

* * *

In sum, the court denies intervenors' April 26, 2007 motion to dissolve the Agreed Injunction as moot; grants in part and denies in part the Siesta Village plaintiffs' May 29, 2007 motion (as corrected June 8, 2007) for summary judgment; denies intervenors' June 28, 2007 motion (as amended June 29, 2007) for summary judgment as to the consolidated plaintiffs' claims and as to intervenors' counterclaims; denies intervenors' June 28, 2007 motion (as amended June 29, 2007) for summary judgment as to their cross-claim against defendant Steen; denies defendants' June 29, 2007 motion for summary judgment on plaintiffs' claims; grants defendant Steen's June 29, 2007 motion for summary judgment on intervenors' cross-claim; grants in part and denies in part the Wine Country plaintiffs' June 29, 2007 motion for summary judgment on the Wine Country plaintiffs' claims; and grants the Wine Country plaintiffs' June 29, 2007 motion for summary judgment on intervenors' counterclaims.

The court declares the regime embodied in the following provisions to be unconstitutional as applied to out-of-state wine retailers: §§ 6.03, 11.46(a)(11), 11.61(b)(19), 22.03 (version before it was amended in

2007), 22.03 (current version), 24.01(c), 24.03, 54.12, 107.05(a), 107.07(a), 107.07(f), and 109.53. To remedy the constitutional violations, the court—as applied to out-of-state wine retailers—enjoins enforcement of the Texas citizenship requirements embodied in §§ 6.03, 11.46(a)(11), 11.61(b)(19), 24.01(c), and 109.53; enjoins the ban on sale and shipment of wine contained in §§ 54.12 and 107.07(f); and enjoins the in-county shipping limitation imposed by §§ 22.03 and 24.03. The court also enjoins enforcement of §§ 107.05(a) and 107.07(a), as applied to Texas consumers who seek to purchase wine from out-of-state retailers, and as applied to entities who would be barred by those provisions from delivering wine to Texas consumers.

The effect of today's opinion and judgment is this: Out-of-state wine retailers—including the wine retailers among the Siesta Village plaintiffs and the Wine Country plaintiffs—may now sell and ship wine to Texas residents, provided the retailers first obtain the necessary TABC permits and otherwise comply with provisions of Texas law that the court has not enjoined, including the requirement that they purchase the wine from a Texas-licensed wholesaler. Texas-resident wine consumers—including wine consumers among the Siesta Village plaintiffs and the Wine Country plaintiffs—may now, in addition to the limited quantity of wine for personal use allowed under § 107.07(a), import wine for personal use, without being required to hold their own permit, provided they purchase the wine from a retailer who holds a Texas permit.

SO ORDERED.

January 14, 2008.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

Supreme Court, U.S.
FILED
JAN 21 2011
OFFICE OF THE CLERK

No. 10-671

IN THE
Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM, K&L WINE MERCHANTS, BEVERAGES & MORE, INC., DAVID L. TAPP, RONALD L. PARRISH, JEFFREY R. DAVIS,

Petitioners,

v.

JOHN T. STEEN, JR. GAIL MADDEN, JOSE CUEVAS, JR., ALLEN STEEN, GLAZER'S WHOLESALE DRUG COMPANY, INC., REPUBLIC BEVERAGE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR GLAZER'S WHOLESALE DRUG COMPANY, INC. AND REPUBLIC BEVERAGE CO.

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QUESTION PRESENTED

In *Granholm v. Heald*, 544 U.S. 460 (2005), this Court held that the dormant Commerce Clause prohibits discrimination against out-of-state alcohol producers and products. In so doing, *Granholm* drew a distinction between producers and products, on the one hand, and distributors or retailers of alcohol, on the other. Specifically, the majority in *Granholm* reaffirmed, and the dissent agreed, that the Twenty-first Amendment shields from dormant Commerce Clause scrutiny state laws that channel the distribution of alcohol exclusively through in-state wholesalers and in-state retailers, such as the three-tier system used by Texas and numerous other states.

The question presented is whether, contrary to the unanimous view of the courts of appeals and the laws of 49 States, the dormant Commerce Clause prohibits state laws that limit the distribution of alcohol to in-state wholesalers and in-state retailers.

RULE 29.6 STATEMENT

Respondents Glazer's Wholesale Drug Company, Inc. and Republic Beverage Co. are private corporations. No publicly held company owns 10% or more of either corporation's stock.

Texas government officials John T. Steen, Jr., Gail Madden, Jose Cuevas, Jr., and Allen Steen were also defendants in the court of appeals and are Respondents in this Court.

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INTRODUCTION

The petition contends that this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), interprets the dormant Commerce Clause to forbid states from channeling the distribution of alcohol exclusively through in-state wholesalers and retailers. It did no such thing. To the contrary, the Court drew a sharp distinction between producers and products, on the one hand, and distributors and retailers of alcohol, on the other. The Court unanimously agreed that the Twenty-first Amendment immunizes from dormant Commerce Clause scrutiny state laws that channel the distribution of alcohol through in-state wholesalers and in-state retailers, such as the three-tier system used by Texas and numerous other states.

Petitioners do not question, or ask this Court to revisit, *Granholm*. They argue only that state laws such as those challenged here are invalid under *Granholm*, and that any argument to the contrary misconstrues this Court's ruling. At most, this issue warrants further percolation and is unworthy of the Court's consideration at this time. After all, not a single federal court of appeals to date has agreed with the petition's interpretation of *Granholm*. To the contrary, the Second and Fifth Circuits have both unanimously rejected this interpretation, and instead construed *Granholm* specifically to *authorize* such laws. What's more, Petitioners do not contest that their interpretation of *Granholm*, if adopted, would nullify the laws of virtually every State in the Union.

The Court should deny the petition and await further percolation of this issue in other federal

courts of appeals before even contemplating such a dramatic disruption to the industry. After all, if Petitioners are indeed correct about their interpretation of *Granholm*, a division of circuits will emerge soon enough, and the Court can consider the worthiness of a certiorari petition properly presenting that issue at that time.[1]

STATEMENT

1. As is true in every State in the country, in Texas, alcohol manufacture, distribution, and sales are subject to restrictions peculiar to the industry. These restrictions have deep historical roots, and stem from a "prevailing view . . . that [alcohol] was a unique product that posed unusual dangers, both directly as an intoxicant, and indirectly, as a stream of commerce that generated corruption and crime." *Arnold's Wines v. Boyle*, 571 F.3d 185, 198 (2d Cir. 2009) (Calabresi, J., concurring). When the constitutional prohibition on alcohol was lifted by the Twenty-first Amendment, the authority of States over alcohol was given constitutional grounding. *See* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is

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1 As addressed in Section C, *infra*, this case is also a uniquely bad vehicle to review the question presented, because the Fifth Circuit identified a narrower ground for rejecting Petitioners' challenge. As detailed below, the court of appeals observed that Texas "has not discriminated among retailers" merely by authorizing in-state retailers to make *local* deliveries. Pet. App. 47a. Accordingly, even a favorable judgment for Petitioners on the question presented would not alter the judgment of the court of appeals.

hereby prohibited."). As this Court reaffirmed in *Granholm v. Heald*, "'[t]he Twenty-first Amendment grants the States *virtually complete control* over . . . how to structure the liquor distribution system.'" 544 U.S. 460, 488 (2005) (emphasis added) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

In an "'unquestionably legitimate'" exercise of this constitutional authority, Texas, like virtually every State, maintains a three-tier system of alcohol distribution. *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality)); *see also* Tex. Alco. Bev. Code Ann. § 6.03(i). Such systems require "that liquor pass through a licensed in-state wholesaler" before being sold by an in-state retailer to the ultimate consumer. *Granholm*, 544 U.S. at 518 (Thomas, J., dissenting); *see also id.* at 469, 489 (majority opinion) (noting Michigan's requirement that sales be through "in-state wholesalers" and "in-state retailers," and emphasizing that "States may . . . funnel sales through the three-tier system").

2. Petitioners are out-of-state wine retailers and Texas wine consumers who brought suit against several Texas state officials (the "State Defendants") in federal district court to challenge certain aspects of Texas' three-tier system and of its alcohol regulatory scheme more generally. In the only of these claims pressed before this Court, Petitioners challenged Texas' law authorizing certain in-state retailers to deliver or ship alcoholic beverages directly to consumers within the county in which the retailer is located. Out-of-state retailers, in contrast, may not directly ship or deliver alcohol to consumers anywhere in Texas. Petitioners contended that this

distinction was unconstitutional discrimination under the dormant Commerce Clause. Respondents Glazer's Wholesale Drug Company, Inc. and Republic Beverage Company (collectively, "Intervenor Defendants"), licensed in-state wholesalers of alcoholic beverages, intervened to defend the statutes.

On appeal from the District Court's invalidation of the challenged provision, the Fifth Circuit reversed. It first noted that this Court's decision in *Granholm*, which all parties agree governs this case, invalidated "direct shipping" laws that discriminated against out-of-state *producers*, not *retailers*. Pet. App. 34a-35a. In contrast to the states whose laws were struck down in *Granholm*, "Texas grants in-state and out-of-state wineries the same rights." Pet. App. 43a (citing Tex. Alco. Bev. Code Ann. §§ 54.01-54.12).

In considering "what else," other than discrimination against producers, "is invalid under the Supreme Court's *Granholm* reasoning," the Court of Appeals observed that the three-tier system "has been given constitutional approval." Pet. App. 44a; *see also Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432). "The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself." Pet. App. 44a. In identifying such discrimination, the court noted that "a beginning premise is that wholesalers and retailers may be required to be within the State." *Id.* at 48a. It then upheld in-county deliveries, such as those permitted by Texas law, as "a constitutionally benign incident of an acceptable three-tier system." *Id.*

The court denied Petitioners' subsequent petition for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

A. There Is No Split Among the Courts of Appeals, as Petitioners Do Not Dispute

The petition paints the decision of the court of appeals as "turn[ing] *Granholm* upside down," and asserts that it is "high time for this Court to clear up the manifest confusion in this area." Pet. 2, 20.

But the courts of appeals have exhibited no confusion about what *Granholm* does and does not prohibit. To the contrary, the few courts of appeals that have addressed the issue to date are in complete harmony over its meaning. *Granholm* prohibits discrimination between in-state and out-of-state producers or products, particularly insofar as that discrimination exempts in-state producers or products from a State-mandated three-tier system of alcohol distribution. *See, e.g.*, *Freeman v. Corzine*, Nos. 08-3268 & 08-3302, 2010 U.S. App. LEXIS 25694 (3d Cir. Dec. 17, 2010); *Arnold's Wines*, 571 F.3d at 190; Pet. App. 35a; *see also Anheuser-Busch, Inc. v. Schnorf*, No. 10-cv-1601, 2010 U.S. Dist. LEXIS 91732, at *36-38 (N.D. Ill. Sept. 3, 2010). But state laws that merely channel the distribution of alcohol (whether in-state or out-of-state) through in-state wholesalers and in-state retailers, including three-tier systems, continue to be authorized under the express terms of the Twenty-first Amendment and various acts of Congress, and are untouched by *Granholm*.

Accordingly, the petition fails on its own terms. If the petition is right, and it turns out that lower courts are indeed "confused" over the proper meaning of *Granholm*, a split of authority will eventually emerge – and the Court can consider a proper peti-

tion for certiorari at that time. But unless and until that happens, the issue is unworthy of this Court's consideration, and the petition should be denied.

1. As Petitioners acknowledge, their complaint is nearly identical to a challenge raised to New York law and rejected by the Second Circuit. Pet. 2 (citing *Arnold's Wines*, 571 F.3d 185). As here, that case involved a state law under which in-state "retailers, but not out-of-state retailers, may deliver liquor directly to New York residents." *Arnold's Wines*, 571 F.3d at 188. New York law, like Texas law and unlike the statutes at issue in *Granholm*, made "no distinction between liquor produced in New York and liquor produced out of the state: both may be shipped directly to New York consumers by licensed in-state retailers." *Id.* at 190; *see also* Pet. App. 43a ("Texas grants in-state and out-of-state wineries the same rights.").

The Second Circuit rejected the plaintiffs' argument that differential treatment of in-state and out-of-state *retailers* warrants the same condemnation as differential treatment of in-state and out-of-state *producers*. First, the court concluded that by challenging New York's requirement that wholesalers and retailers be present in and licensed by the state, the plaintiffs effectively challenged the three-tier system itself. *Arnold's Wines*, 571 F.3d at 190-91; *cf. Granholm*, 544 U.S. at 469 (describing Michigan's three-tier system as limiting wholesaler and retailer participation to licensed in-state entities). Because the three-tier system has been repeatedly blessed by this Court, the panel declined to undo it under the guise of the dormant Commerce Clause. *Granholm*, 544 U.S. at 489; *Arnold's Wines*, 571 F.3d at 190-91.

Second, *Arnold's Wines* noted that the challenged law, unlike the laws at issue in *Granholm*, did not "create[] specific exceptions to the states' three-tier systems favoring in-state producers." 571 F.3d at 191. To the contrary, "[a]lcohol sold by in-state retailers directly to consumer in New York has *already passed through* the first two tiers – producer and wholesaler – and been taxed and regulated accordingly." *Id.* (emphasis added). As a result, "New York's laws evenhandedly regulate the importation and distribution of liquor within the state," and do not violate the dormant Commerce Clause. *Id.* at 192.

Judge Calabresi, who joined the majority opinion, also wrote separately to note that, under *Granholm*, courts "can only come out one way." *Arnold's Wines*, 571 F.3d at 201 (Calabresi, J., concurring). A contrary decision, he concluded, would "require us to ignore too much of the background jurisprudence and to extend the trend well beyond *Granholm* while ignoring some of its most specific language." *Id.*

2. No other court of appeals has even addressed a provision similar to the ones at issue in the instant case and in *Arnold's Wines*, much less created a split with the Fifth and Second Circuits. The most analogous other case – *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) – is fully consistent with *Arnold's Wines* and the decision below, confirming the absence of any confusion whatsoever among the courts of appeals.

In *Brooks*, the plaintiffs brought a dormant Commerce Clause challenge to a state law permitting consumers to "personally carry into Virginia no more than one gallon (or four liters) of alcoholic bev-

erages for personal consumption." *Brooks*, 462 F.3d at 345 (Op. of Niemeyer, J.). In upholding the challenged statute, Judge Niemeyer explained that the clear import of the plaintiffs' claim was that the statute advantaged in-state *retailers* (the only in-state entities selling directly to consumers) over out-of-state retailers. *Id.* at 352. He then rejected any "argument that compares the status of an in-state retailer with an out-of-state retailer – or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart – [a]s nothing different than an argument challenging the three-tier system itself." *Id.*[2]

3. An issue that has been addressed in the opinions of, at most, three courts of appeals, and given rise to no conflict whatsoever, is a poor candidate for this Court's limited docket. As addressed *infra* Part B, the unanimous view is no surprise; *Granholm* clearly protects the laws at issue here.

But even if Petitioners were correct that the holdings of the courts of appeals "cannot be squared" with *Granholm*, this Court's review would still be unwarranted. Pet. 2. If *Granholm* requires it, other courts of appeals will, in time, adopt Petitioners' position and create a split. For now, however, no such split exists. *Granholm* was decided less than six years ago; further percolation will give Petitioners, and those sharing their interests, an opportunity to persuade the courts of appeals of their perspective.

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[2] The majority of the panel upheld the challenged statute. Judge Niemeyer reached this broader question in a portion of the majority opinion not joined by the other panel members.

The importance of obtaining substantial lower court development before considering the constitutionality of laws which prohibit direct shipping to consumers by out-of-state retailers is only heightened by the ubiquity of such laws. In the court of appeals, the State Defendants filed as an exhibit to their reply brief a chart, summarizing in great detail the relevant laws governing alcoholic beverage sales and imports in all fifty states. Based on the research underlying that chart, the State Defendants concluded that all 48 continental states, as well as Hawaii and the District of Columbia, have adopted a three-tier system or other laws "that favor[] both wholesalers and retailers who have established a retail outlet or distribution center somewhere in the State over their counterparts who have not." Reply Br. of State Defendants 16. Moreover, the State Defendants concluded that 28 states permit direct shipping by retailers to consumers, but that 21 of those states require the retailer to first establish a retail outlet in the state. *Id.* at 16-17. Even in the remaining seven states, the State Defendants stated that "out-of-state retailers are still dramatically disfavored with respect to in-store sales." *Id.* at 17.

The prevalence of the challenged laws, while not guaranteeing their constitutionality, does counsel in favor of responding cautiously to Petitioners' invitation to overturn the unanimous view of the courts of appeals that they raise no constitutional problem. Waiting until more courts of appeals have had the opportunity to determine whether, in fact, *Granholm* is subject to the reading Petitioners would give it before considering granting review is a proper exercise of this caution.

B. The Decision Below Does Not Conflict With *Granholm* or Any Other Opinion of This Court

Though Petitioners cite a handful of general dormant Commerce Clause cases, their core allegation is that the decision of the court of appeals "cannot be squared with this Court's landmark decision in *Granholm*."[3] Pet. 2. But review of *Granholm* confirms that the interpretations of that case by the courts of appeals are not only *consistent* with each other, but are also *correct*.[4]

1. In *Granholm*, out-of-state producers of wine challenged Michigan and New York laws that allowed all wineries to sell alcohol through the States' ordinary three-tier distribution system, but allowed only in-state wineries to ship wine directly to con-

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[3] *Amicus* Specialty Wine Retailers also claims that the decision of the court of appeals conflicts with *Healy v. Beer Institute*, 491 U.S. 324 (1989), which purportedly expands the reach of the dormant Commerce Clause beyond producers to sellers of alcoholic beverages. Specialty Wine Retailers Br. 12-14. But *Healy* addressed a statute that directly burdened interstate commerce, by regulating the prices charged by both in-state and out-of-state brewers that participated in the interstate market. 491 U.S. at 341. The present case does not impose any such burden on participation in interstate commerce, and Petitioners do not contend otherwise.

[4] The constitutionality of Texas' system is even clearer under *Granholm* than a statutory scheme that, like the New York law at issue in *Arnold's Wines*, allows state-wide shipment by in-state retailers. As the Fifth Circuit held, Texas "has not discriminated among retailers" because Wine Country, which is not located in any county of Texas, "is not similarly situated to Texas retailers and cannot make a logical argument of discrimination." Pet. App. 47a.

sumers. *Granholm*, 544 U.S. at 466-67. By a 5-4 vote, the Court struck down the law favoring in-state wineries over out-of-state wineries. *Id.* at 476 ("Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*.") (emphasis added).

This holding, however, raised questions about the validity of three-tier systems themselves, which had long served to channel the distribution of alcohol exclusively through in-state wholesalers and in-state retailers. *See* 544 U.S. at 488-89. All nine justices agreed that such laws – including not only the three-tier system, but also state-controlled distribution regimes – would continue to be valid and untouched by the *Granholm* ruling. *Id.*; *id.* at 517 (Thomas, J., dissenting) ("the Twenty-first Amendment was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the Commerce Clause, as the majority properly acknowledges"); *id.* at 488-89 ("'The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" (majority opinion) (alteration in original) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment))).

Petitioners attempt to recharacterize this passage in *Granholm* by contending that the Court's reference to the three-tier system concerns only laws that require separation between, and forbid joint ownership of, production, wholesale distribution, and retail sales – and not the exclusive use of in-state wholesalers and retailers. Pet. 13-15. But that is an implausible reading of *Granholm*, for the mere separation of these functions would not have been drawn into question by *Granholm*. The entire purpose of

this passage in *Granholm* is to address the issue of state laws that channel business activity through in-state rather than out-of-state entities. The majority's conclusion was simply that the nondiscrimination principle of the dormant Commerce Clause would apply to the production, but not to the distribution, of alcohol, in light of the text, history, and tradition of the Twenty-first Amendment. *Granholm*, 544 U.S. at 488-89.

This Court thus restated its conclusion in unambiguous terms: "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489.[5] Texas law does so, and is thus protected. *See* Pet. App. 43a ("Texas grants in-state and out-of-state wineries the same rights."); *see also Arnold's Wines*, 571 F.3d at 191. Contrary to Petitioners' argument, *Granholm*'s more general statements that the dormant Commerce Clause prohibits discrimination against out-of-state entities do not override this express blessing. *See* Pet. App. 47a ("The dormant Commerce Clause applies [to regulation of alcoholic beverages], but it applies differently than it does to products whose

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[5] In light of this unambiguous principle, Petitioners are plainly incorrect that the distinction drawn by the courts of appeals between producers and retailers with respect to permissible regulation "has no basis in law or logic." Pet. 3. *Granholm* repeatedly limited its analysis to discrimination against *producers* or *products*. *E.g.*, *Granholm*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."); *id.* at 482-486 (noting that the Webb-Kenyon Act, the Wilson Act, and the Twenty-first Amendment did not authorize discrimination against "out-of-state goods" or "liquor produced out-of-state").

regulation is not authorized by a specific constitutional amendment.").[6]

2. The challenged Texas law not only complies with *Granholm*'s requirement of neutrality between in-state and out-of-state producers and products; it also is no more than a "constitutionally benign incident of an acceptable three-tier system." Pet. App. 48a; *see also Arnold's Wines*, 571 F.3d at 192 (prohibiting out-of-state retailers from shipping directly, even if in-state retailers are allowed to do so, is "an integral part of [a] three-tier system").

Treating in-state and out-of-state producers differently for purposes of direct shipments "allows in-state, but not out-of-state, wineries [*i.e.*, producers] to circumvent portions of the three-tier system." *Freeman*, 2010 U.S. App. LEXIS 25694, at *27. As such, it is not a valid part of such a system. *Id.*; *Arnold's Wines*, 571 F.3d at 190; Pet. App. 35a; *see also Granholm*, 544 U.S. at 489 (describing three-tier system as "'unquestionably legitimate'").

In contrast, a distinction between in-state and out-of-state retailers is fully consistent with a three-tier system. It *permits* those alcoholic beverages that

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[6] Application of background dormant Commerce Clause principles without change would pose precisely the danger that the States feared in *Granholm*. Specifically, the entire three-tier system, which is based on funneling alcoholic beverages through a separate in-state wholesaler and retailer, would be at risk of invalidation, despite this Court's explicit disavowal of any intention to cause this result. *Granholm*, 544 U.S. at 488; *see also id.* at 518 (Thomas, J., dissenting) ("[T]he three-tier system[,] [a]s the Court concedes . . . is within the ambit of the Twenty-first Amendment, even though [it] discriminates against out-of-state interests.").

have already passed through the state's three-tier system to be shipped directly to consumers, while *prohibiting* alcoholic beverages that have *not* passed through the in-state three-tier system from doing so.[7] *Arnold's Wines*, 571 F.3d at 191. This Court's sanctioning of three-tier systems would be hollow indeed if Texas were required to allow out-of-state retailers to circumvent the system in its entirety, while requiring in-state retailers to comply. *See* Pet. App. 44a; *see also Arnold's Wines*, 571 F.3d at 192 n.3.

Petitioners and their *amici* dispute the significance to the three-tier system of a prohibition on direct shipments by out-of-state retailers, noting that a handful of states have three-tier systems, yet permit such shipments. Pet. 12-13; Specialty Wine Retailers Br. 15 & n.9. Of course, there is nothing impermissible about a State's decision to exempt certain sales from their three-tier systems, so long as the exemptions do not themselves discriminate against out-of-state producers or products. But the fact that such exceptions are *permitted* does not

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[7] *Amicus* Specialty Wine Retailers contends that out-of-state retailers are still subject to a three-tier system; they are just subject to "the three-tier system of the home state of the shipping retailer." Specialty Wine Retailers Br. 16. A critical part of the three-tier system, however, is its requirement that wholesalers and retailers be in-state, which by definition cannot be recreated in another state.

In any event, States cannot directly or indirectly regulate the three-tier system in the retailer's home state, or even ensure that such systems remain in effect. *Healy*, 491 U.S. at 332-33. Accordingly, no State can rely on another State to implement the requirements associated with its own three-tier system.

mean that they are *constitutionally required*, or that the exceptions are "fully compatible with" – as opposed to a limited departure from – the State's three-tier scheme. Specialty Wine Retailers Br. 15.

3. Petitioners' *amici* attempt to bolster their *Granholm* arguments with the perceived policy advantages of Petitioners' position: widespread availability of as many alcoholic products as possible, at as low a price as possible. Specialty Wine Retailers Br. 1; Economists' Br. 12-23. But *amici*'s policy goals are not necessarily shared by the States, which have often sought exactly the opposite goals, namely decreasing or banning access to alcohol altogether. *Granholm*, 544 U.S. at 476; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 & n.14 (1996) (Op. of Stevens, J.). As this Court reaffirmed in *Granholm*, States retain the right "to ban the sale and consumption of alcohol altogether" and to "bar its importation . . . to make its laws effective." *Granholm*, 544 U.S. at 488-89. In short, "the aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for *controlling* liquor by regulating its transportation, importation, and use." *Id.* at 484 (emphasis added). The constitutionality of *restrictions* on alcohol use cannot be judged by their efficiency in *promoting* the use of alcohol.[8]

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[8] The *amici* Economists' Brief, in particular, expresses distaste for "state legislatures," which "systematically underrepresent[]" consumer interests. Economists Br. 12-17. But the Twenty-first Amendment put authority over alcohol squarely in the hands of the States; it did not leave to the judiciary the question of what entity would best protect the interests of consumers in regulating alcohol.

In any event, *amici*'s policy concerns are no different in degree or kind than the policy concerns presented by every case arising under the dormant Commerce Clause. *See, e.g.*, *Granholm*, 544 U.S. at 472 (noting policy reasons underlying dormant Commerce Clause); Economists' Br. 16-17 (Court should be "vigilan[t] . . . to prevent interest-group motivated evasions of the dormant Commerce Clause"). Even if those concerns had resonance here, *amici* call for no more than error correction tied to the specific facts of this case. What's more, those concerns have no resonance here: Congress may immunize state laws from dormant Commerce Clause restrictions at any time, and it has done so here through the Twenty-first Amendment, Webb-Kenyon Act, and other laws, just as it has done in the insurance and other contexts. *See, e.g.*, *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174-75 (1985) (construing the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.*); *Liberty Mut. Ins. Co. v. La. Dep't of Ins.*, 62 F.3d 115, 118 (5th Cir. 1995) (construing the McCarran-Ferguson Act).

C. This Case Presents An Unusually Poor Vehicle To Address Direct Shipping Laws Which Favor In-State Retailers

There is an additional reason not to grant certiorari: This case presents a uniquely poor vehicle for resolving the question presented because the court of appeals provided a separate and independent rationale to support its conclusion.

When this suit was filed, Texas law allowed in-state retailers with appropriate permits to ship their alcoholic beverages statewide. Pet. App. 29a (citing Tex. Alco. Bev. Code Ann. § 22.03 (Vernon 2006) (amended Sept. 1, 2007)). But before the case was

decided by the District Court, the Texas Legislature amended the governing statute to limit "the boundaries of the area of permissible shipment from the entire State to basically the county in which retailer has a store." Pet. App. 30a (citing Tex. Alco. Bev. Code Ann. §§ 22.03 & 24.03 (Vernon 2009)).

The Fifth Circuit explained that Texas had not run afoul of *Granholm* by allowing in-state retailer deliveries. Pet. App. at 47a ("*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries."). It also noted, however, that it need not resolve whether the "statewide delivery version of the provision" required different analysis than the challenged Texas law. Pet. App. 46a ("We need not and do not reach the broader definitional issue."). Instead, the court of appeals relied in part on its conclusion that "sales are being made to proximate consumers, not those distant to the store. Retailers are acting as retailers and *making what conceptually are local deliveries*." *Id.* at 47a (emphasis added); *see also id.* at 48a ("We view local deliveries as a constitutionally benign incident of an acceptable three-tier system.").

Because in-state retailers are making a type of delivery that out-of-state retailers cannot make – *i.e.*, deliveries within the same Texas county in which the retailer is located – the court of appeals held that "Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination." Pet. App. 47a; *id.* (Texas "also has not discriminated among retailers."). The court concluded that Wine Country's contrary argument reflected "illogic," as demonstrated by "the fact that the remedy being sought in this case – allowing out-

of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties – would grant out-of-state retailers dramatically greater rights than Texas ones." Pet. App. 47a.

To be sure, Respondents believe that the Fifth Circuit properly interpreted *Granholm*. Its analysis is fully consistent with *Arnold's Wines*, and, in an appropriate case, the Fifth Circuit's reasoning would require it to approve even Texas' former statute. But the Fifth Circuit was able to rely here on the narrower alternative ground of upholding only the current authorization of county-wide deliveries. Accordingly, this Court's review would be improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM,
K&L WINE MERCHANTS, BEVERAGES & MORE, INC.,
DAVID L. TAPP, RONALD L. PARRISH,
JEFFREY R. DAVIS,

Petitioners,

v.

JOHN T. STEEN, JR., GAIL MADDEN, JOSE CUEVAS, JR.,
ALLEN STEEN, GLAZER'S WHOLESALE DRUG CO., INC.,
REPUBLIC BEVERAGE CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

The brief in opposition only confirms that the issue here is whether the lower courts will be allowed to overrule *Granholm v. Heald*, 544 U.S. 460 (2005). That landmark case holds that the Twenty-first Amendment does not override the Commerce Clause, and therefore does not allow States to discriminate against interstate commerce in the sale of alcoholic beverages. *See id.* at 486. The States had no such right to discriminate before Prohibition, *Granholm* explains, and gained no such right in the Twenty-first Amendment. *See id.* at 484-85. In a nutshell, a statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 488 (internal quotation omitted).

Both the Second and Fifth Circuits have held, and respondents now insist, that *Granholm* gave its "express blessing" to state laws that discriminate against out-of-state retailers in the sale of alcoholic beverages. Opp. 12. According to these courts and respondents, *Granholm* interprets the Twenty-first Amendment to categorically immunize such discrimination from Commerce Clause scrutiny.

It is hard to imagine a more stark distortion of one of this Court's precedents. *Granholm*'s holding that the Twenty-first Amendment does *not* trump the Commerce Clause has been transformed into a holding that the Twenty-first Amendment *does* trump the Commerce Clause. The *Granholm* Court thought it was ending "an ongoing, low-level trade war" between States over the remote sale and direct shipping of wine and other alcoholic beverages, 544

U.S. at 473, but the Second and Fifth Circuits have now given that war their express blessing.

Respondents insist, however, that review is unwarranted because "there is no split among the courts of appeals." Opp. 5 (capitalization modified). That argument misses the point. A circuit split is not an end in itself. Rather, a circuit split serves as a red flag that this Court's guidance is warranted on a particular issue. Here, the lower courts' manifest confusion on the scope of *Granholm* underscores the need for such guidance. *See, e.g.*, *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (opinion of Niemeyer, J.) (interpreting *Granholm* to bless discrimination against out-of-state retailers); *id.* at 361 (Traxler, J., concurring in part and concurring in the judgment) (refusing to join this portion of Judge Niemeyer's opinion); *id.* at 361-63 (Goodwin, J., dissenting) (rejecting this portion of Judge Niemeyer's opinion); Pet. App. 41a (describing *Siesta Vill. Mkt. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008)); Pet. App. 77-91a (upholding petitioners' constitutional challenge).

Indeed, Judge Calabresi concurred in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), to cry out for guidance on this score. In his view, *Granholm* "leaves lower courts in a difficult situation" in which they know that "the general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation," but do not know "how far or how fast [to] move along that vector." *Id.* at 200-01; *see also id.* at 192 (*Granholm* "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"); *id.* at 200 (*Granholm* "leave[s]

state legislatures and lower federal courts with no firm understanding of what the law actually is"); *id.* (lower courts "left to try to guess at the currently applicable rule"); *id.* ("To the student and teacher of the law, it appears clear that the meaning of the Twenty-First Amendment is changing. But it is difficult to know just how much the Supreme Court wants that amendment to evolve."). In effect, Judge Calabresi threw up his hands and urged the lower courts to give *Granholm* its narrowest possible interpretation "unless and until" this Court revisits this area: "If the Supreme Court wishes further to meld the Twenty-First Amendment into the broad constitutional landscape, so be it." *Id.* at 201.

This Court should take up Judge Calabresi's challenge, and reaffirm that it meant what it said in *Granholm*: the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause, and thus does not "give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." 544 U.S. at 484-86. Regardless of whether this Court's approach to the Twenty-first Amendment has "evolve[d]" over the years, *Arnold's Wines*, 571 F.3d at 200 (Calabresi, J., concurring), *Granholm* sets forth the law of the land. Because the Second and Fifth Circuits have turned that decision on its head, and thereby blessed an interstate trade war "destructive of the very purpose of the Commerce Clause," *Granholm*, 544 U.S. at 473, this Court's review is warranted. "This Court has a duty to defend the integrity of its precedents." *Alderman v. United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

ARGUMENT

I. The Decision Below Conflicts With *Granholm*.

Respondents' basic contention is that *Granholm* draws a "sharp distinction" between *producers* and *retailers* of alcoholic beverages, prohibiting discrimination against the former while blessing discrimination against the latter. Opp. 1. Even cursory review of *Granholm* refutes that contention.

Rather, *Granholm* unequivocally holds that the Twenty-first Amendment does not save discriminatory state legislation otherwise barred by the Commerce Clause. *See* 544 U.S. at 476-89. The decision details the history of the Twenty-First Amendment at great length, and concludes that the Amendment merely "restored to the States the powers they had" before Prohibition, which did not include "the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-85; *see also id.* at 487-88 (interpreting prior caselaw to "foreclose[] any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny").

Naturally, in applying its non-discrimination rule to the facts at hand, *Granholm* refers to "wine producers," *id.* at 493, since they were the ones who challenged the discriminatory state laws at issue in that case. But *Granholm* draws no distinction between producers and retailers, just as it draws no distinction between wine and other alcoholic beverages. The Fifth Circuit's assertion that *Granholm* does not apply here because "'Texas grants in-state and out-of-state *wineries* the same

rights,'" Opp. 4, 6, 12 (quoting Pet. App. 43a; emphasis added), is a *reductio ad absurdum* of that decision.

Respondents' position cannot be squared with *Granholm*. If *Granholm* is correct that the Twenty-first Amendment gives the States no power to enact discriminatory legislation that otherwise would violate the Commerce Clause, *see* 544 U.S. at 484-85, then respondents are wrong that the Twenty-first Amendment gives the States precisely such power, *see* Opp. 12. It is as simple as that: *Granholm* says that the Twenty-first Amendment does *not* immunize any discriminatory laws from Commerce Clause scrutiny, while respondents say that the Twenty-first Amendment *does* immunize the discriminatory laws at issue here from Commerce Clause scrutiny. Respondents cannot have it both ways: if the Twenty-first Amendment does not alter the non-discrimination principle of the Commerce Clause, respondents cannot rely on the Twenty-first Amendment to defend discrimination.

Indeed, respondents' alleged distinction between producers and retailers makes no sense, given that producers are acting as retailers when they remotely sell and directly ship wine to consumers in other States. Thus, "when a California winery sells and ships wine to a consumer, it does so not under its producer's license, but under its license as a retailer in California." Specialty Wine Retailers' *Amicus* Br. 3. Whether a producer decides to ship its products itself or through a retailer is immaterial: the Commerce Clause protects interstate *commerce*, not interstate *production*. That is why, as *Granholm* emphasized, "States may not enact laws that burden

out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses." 544 U.S. at 472 (emphasis added). It is telling that respondents are unable to cite a single case in which this Court has drawn a distinction under the Commerce Clause between producers and retailers. To the contrary, this Court has long invalidated under the Commerce Clause laws that discriminate against out-of-state retailers. *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Respondents' assertion that *Granholm* "conclu[ded]" that "the nondiscrimination principle of the dormant Commerce Clause would apply to the *production*, but not to the *distribution*, of alcohol," Opp. 12 (emphasis added), is thus baseless. Rather, the lesson of *Granholm* is clear: "the Commerce Clause prevent[s] States from discriminating against imported liquor." 544 U.S. at 476; *see also id.* at 493 ("If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.").

II. The Non-Discrimination Principle Of The Commerce Clause Does Not Conflict With The Three-Tier System.

Respondents argue that *Granholm* blessed discrimination against out-of-state retailers by blessing the three-tier system through which most States regulate the distribution of alcoholic beverages. *See, e.g.*, Opp. 1, 3, 5, 11. The premise of this argument is that such discrimination is "'inherent in the three-tier system,'" *id.* at 4 (quoting Pet. App. 44a), so that a challenge to such discrimination is "a frontal attack on the constitutionality of the three-tier system itself," *Arnold's Wines*, 571 F.3d at 190.

That premise is manifestly incorrect. As petitioners and their *amici* have noted, and respondents do not contest, at least ten States with three-tier systems specifically allow out-of-state retailers to remotely sell and directly ship wine and/or other alcoholic beverages on the same terms as in-state retailers. *See* Pet. 13 (citing statutes); Specialty Wine Retailers' *Amicus* Br. 15 & n.9 (same). Indeed, the Model Direct Shipping Bill, cited with approval in *Granholm*, *see* 544 U.S. at 491-92, establishes a template for such non-discriminatory statutes. Discrimination against out-of-state retailers with respect to direct shipping, thus, is by no means an "inherent" part of a three-tier system. There is no conflict whatsoever between such a system and the non-discrimination principle of the Commerce Clause.

Respondents try to dismiss this point by characterizing non-discriminatory direct shipping laws as "exceptions" to the three-tier system, and arguing that "the fact that such exceptions are *permitted* does not mean that they are *constitutionally required*." Opp. 14-15 (emphasis in original). That response misses the point. As noted above, the very premise of the decision below (as well as the Second Circuit's decision in *Arnold's Wines*) is that discrimination against out-of-state retailers is "inherent" in the three-tier system, so that when *Granholm* reaffirmed the validity of such a system, it necessarily affirmed the legitimacy of such discrimination. If, as it turns out, discrimination against out-of-state retailers is *not* inherent in a three-tier system, it follows that *Granholm* did not bless such laws—and the constitutional analysis of the Second and Fifth Circuits crumbles.

Indeed, that straightforward point refutes much of the opposition brief. Respondents characterize this lawsuit as a challenge to the legitimacy of the three-tier system itself, which is why they assert that petitioners' position, if adopted, "would nullify the laws of virtually every State in the Union," and result in "dramatic disruption to the industry." Opp. 1, 2; *see also id.* at 9 (same). That assertion is incorrect: petitioners do not challenge the legitimacy of the three-tier system itself, but merely the operation of that system in a way that violates the anti-discrimination principle of the Commerce Clause. The three-tier system may be "ubiquit[ous]," Opp. 9, but so too (until now) is the free flow of interstate commerce in our federal republic.

The legitimacy of the three-tier system, in other words, does not immunize the *operation* of such a system from challenges under the Commerce Clause. To the contrary, this Court has upheld a Commerce Clause challenge to a three-tier system that operated in a way that discriminated against interstate commerce. *See Healy v. Beer Inst.*, 491 U.S. 324, 326-27 & n.2, 340-41 (1989). Respondents try to distinguish *Healy* as involving "a statute that directly burdened interstate commerce," Opp. 10 n.3, but that case specifically invalidated the statute on the ground that it *discriminated* against interstate commerce, *see* 491 U.S. at 340-41, as well as on the ground that it directly burdened interstate commerce, *see id.* at 335-40. The fact that a State may operate its three-tier system to discriminate against interstate commerce, as here and in *Healy*, does not doom the three-tier system itself, but only the discrimination.

The alleged threat to the three-tier system here, just as in *Granholm*, is thus a bogeyman. Indeed, wholesalers and a majority of States argued strenuously in *Granholm* that allowing remote sales and direct shipping by out-of-state wineries would undermine the three-tier system. *See, e.g.*, *Amicus* Br. of Ohio and 32 other States, *Granholm v. Heald*, No. 03-1116, 2004 WL 1743941 (July 29, 2004), at 1, 19-21. Under this view, the three-tier system requires that all liquor be sold to consumers by a licensed in-state entity subject to the State's enforcement and tax authority. *Granholm*, however, rejected the notion that the three-tier system trumps the non-discrimination principle of the Commerce Clause. Thus, while "the three-tier system itself is unquestionably legitimate," the "discriminatory" operation of such a system "eliminates the immunity afforded by the Twenty-first Amendment." 544 U.S. at 488-89 (internal quotations omitted).

Let there be no mistake what is going on here: this case is not about the legitimacy of the three-tier system, but about the efforts of politically favored interest groups to use that system as a fig-leaf for discrimination against interstate commerce. *See generally* Economists' *Amicus* Br. 12-16. States need not authorize in-state retailers to remotely sell and directly ship alcoholic beverages at all, but once they decide to do so, the Commerce Clause bars them from discriminating against out-of-state retailers. The obvious beneficiaries of such discrimination are in-state wholesalers, who also happen to be the staunchest defenders of such protectionist legislation. Indeed, it is telling that the respondent state officials have not even tried to defend Texas'

discriminatory laws in this Court, but have left that task to the respondent wholesalers.

III. This Case Squarely Presents The Question Whether The Twenty-First Amendment Allows States To Discriminate Against Out-Of-State Retailers Of Alcoholic Beverages.

Finally, respondents contend that "this case presents a uniquely poor vehicle for resolving the question presented" because the challenged Texas statutes allow in-state retailers to remotely sell and directly ship alcoholic beverages within the county in which they are located, not the entire State. Opp. 16; *see also id.* at 2 n.1, 10 n.4. According to respondents, this point provides "a separate and independent rationale" to support the judgment. Opp. 16. Again, respondents are wrong.

As noted in the petition, this Court has long held that a State "'may not avoid the strictures of the Commerce Clause'" by crafting protectionist legislation on a local or county-wide, rather than State-wide, basis. Pet. 18-19 (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992)); *see also C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 & n.4 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). It is immaterial whether a State gives its own businesses a county-wide, as opposed to a state-wide, benefit—as long as the State gives its businesses a benefit that it denies to out-of-state businesses, it is by definition discriminating between in-state and out-of-state businesses. The Texas statutes at issue here discriminate on their

face against out-of-state retailers, which (in sharp contrast to in-state retailers) are barred from remotely selling and directly shipping wine or other alcoholic beverages *anywhere* in Texas. *See* Pet. App. 81-86a & n.17; *compare* Tex. Alco. Bev. Code §§ 22.03(a), 24.03 (allowing in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to consumers anywhere within the same county) *with id.* §§ 54.12, 107.07(f) (prohibiting out-of-state retailers from remotely selling and directly shipping such beverages anywhere in Texas).

Indeed, this discrimination is particularly pronounced in a big State like Texas, where many counties are larger in terms of population or size than entire States. *See* Specialty Wine Retailers' *Amicus* Br. 7. That may explain why, as the Fifth Circuit noted, the Texas Solicitor General acknowledged below that "the geographical limits" in the Texas Alcoholic Beverage Code are "irrelevant" for present purposes, Pet. App. 20a, 46a, and the result in this case would be the same if in-state retailers could remotely sell and directly ship *anywhere* in the State.

Respondents nonetheless insist that out-of-state retailers are "'not similarly situated to Texas retailers and cannot make a logical argument of discrimination,'" Opp. 17 (quoting Pet. App. 47a), *without even addressing* the settled law described above. Rather, respondents simply parrot the Fifth Circuit's assertion that in-state retailers are "'making what conceptually are *local deliveries*.'" *Id.* (quoting Pet. App. 47a; emphasis modified).

Again, as explained in the petition, this case is not about "local deliveries" that can be performed only by a local retailer. *See* Pet. 19; *see also* Pet. App. 85-86a. Rather, this case is about remote sales and direct shipping, which can be performed equally well by in-state and out-of-state retailers thanks to the telephone, the Internet, UPS, FedEx, and other instrumentalities of modern interstate commerce.

Thus, the fact that the discriminatory benefit at issue here is county-wide, rather than state-wide, in scope does not provide a "separate and independent rationale" to support the judgment. Opp. 16. Under the Commerce Clause, "'actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.'" Pet. App. 84a (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)). That is why the Fifth Circuit did not, and could not, rest its holding on the scope of the Texas statutes. Rather, the Fifth Circuit was required to, and did, decide whether the Twenty-first Amendment allows States to discriminate against out-of-state retailers in the sale of alcoholic beverages. The Fifth Circuit decided that dispositive question incorrectly, and that question is now squarely presented for this Court's review.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant review.

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Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM, ET AL.,
Petitioners,

v.

JOHN T. STEEN, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ECONOMISTS, LAW AND ECONOMICS SCHOLARS, AND FORMER FTC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 202 (1994) 8, 9

Other Authorities

Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 J. POLITICS. 859 (2007) 21, 22

Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) 17

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Dennis Carlton & Judith Chevalier, *Free Riding and Sales Strategies for the Internet*, 49 J. INDUS. ECON. 441 (2001) 20

Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*. 46 MANAGEMENT SCIENCE 563, 563 (2000) 20

FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003) ..... passim

Gina M. Riekhof & Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, 87 AM. J. AGRICULTURAL ECON. 439 (2005) 16

Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, 27 No. 3, REG. 30 (2004) 16

James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post and Hold Laws on Consumption and Social Harms* (Fed. Trade Comm'n, Working Paper No. 304, August 2010) 15

Jerry Ellig & Alan E. Wiseman, *Competitive Exclusion with Heterogeneous Sellers: The Case of State Wine Shipping Laws* (Mercatus Center, George Mason Univ., Working Paper, Dec. 20, 2010) 22

Jerry Ellig & Alan E. Wiseman, *Interstate Trade Barriers and Potential Regulatory Competition: The Case of Direct Wine Shipping*, 19 J. PRIVATE ENTER., no. 2, 2004 21

Karen Clay et al., *Prices and Price Dispersion on the Web: Evidence from the Online Book Industry*, 49 J. INDUS. ECON. 521 (2001) 20

Letter from Fed. Trade Comm'n Staff to William Magee, Chairman, N.Y. Assembly Agriculture Comm. (Mar. 29, 2004) 18, 25

MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) 15

Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-*Granholm *Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505 (2008) 14

Peter Zwiebach, *Consolidation Marches on as Leading Players Expand*, IMPACT: GLOBAL NEWS AND RESEARCH FOR THE DRINKS EXECUTIVE, Apr. 15-May 1 2009 17

Press Release, L.D. Johnston et al., Univ. of Mich., Marijuana Use is Rising; Ecstasy Use is Beginning to Rise; and Alcohol Use is Declining Among U.S. Teens (Dec. 14, 2010) 24

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Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J. LAW & LIBERTY 609 (2005) 10, 11

Wayne T. Brough, *No Wine Shall be Served Before Its Time—At Least Not Without Wholesalers Taking a Cut*, Issue Analysis, July 14, 2010 18

INTEREST OF *AMICI CURIAE*[1]

The amici curiae submitting this brief are economists, law and economics scholars, and former FTC officials who teach, conduct research, and publish on economics and economic regulation. A list of amici is set forth in the appendix hereto.

Amici have no financial interest in any party to the case or in the outcome of the case.

STATEMENT

Petitioners seek a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit rejecting a challenge to a facially discriminatory Texas state law that permits in-state retailers to accept remote orders and directly ship alcoholic beverages but denies that same right to out-of-state businesses. Petitioners contend that the Texas law violates the dormant Commerce Clause of the United States Constitution as interpreted in *Granholm v. Heald*, 544 U.S. 460 (2005). The Fifth Circuit affirmed a grant of summary judgment in favor of Respondents, holding that Texas's discriminatory regime was permissible without requiring the state to justify its discrimination with a legitimate regulatory interest.

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[1] This brief is filed pursuant to notice provided to the parties more than ten days before the filing of the brief and their written consent. No counsel for a party authored this brief in whole or in part. Professors Todd Zywicki and Joshua Wright received funding for preparation and submission of this brief from Family Winemakers of California, a 625 member statewide association of wine producers, independently owned vineyards, and suppliers, founded in 1991 and based in Sacramento, California.

Amici fully endorse Petitioners' arguments explaining why a grant of certiorari is appropriate here. Amici write separately to highlight the harm to small wineries, consumers, and interstate commerce from allowing states to enact discriminatory barriers to interstate commerce in wine and other alcoholic beverages. The Federal Trade Commission describes discriminatory state laws inhibiting direct shipment as "the single largest regulatory barrier to expanded e-commerce in wine." FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003) [hereinafter "FTC Report"], at 3, *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf, and the decision below perpetuates this harm. Moreover, the Fifth Circuit's opinion will result in substantial harm to consumers, small wineries, and interstate commerce, and will invite evasion of *Granholm*'s protections by politicians and special interests seeking to erect protectionist policies, notwithstanding *Granholm*'s guarantee of equal access to America's markets for wineries and consumers. Given the importance of this issue to American consumers, small wineries, and interstate commerce, and the increasing uncertainty caused by tensions arising from judicial efforts to apply *Granholm* to various state laws, it is essential for this Court to review the decision of the Fifth Circuit. *See, e.g.*, *Freeman v. Corzine*, __ F.3d ___, 2010 WL 5129219 (3d. Cir. 2010) (applying *Granholm* to New Jersey law).

SUMMARY OF ARGUMENT

1. The decision below conflicts with this Court's reasoning in *Granholm v. Heald*, 544 U.S. 460 (2005),

undermines the system of nondiscriminatory and robust interstate commerce guaranteed by the Commerce Clause of the Constitution, and imposes unjustified injury on the nation's citizen-consumers and wine producers. The Texas regulatory scheme expressly discriminates between in-state and out-of-state wine retailers, striking at the heart of reasonable, non-discriminatory regulation recognized in *Granholm*.

2. The decision below will result in substantial harm to consumers, small wineries, and interstate commerce. It rests on three fundamental errors with profound economic consequences. First, the Fifth Circuit improperly limits *Granholm* and thus the dormant Commerce Clause's protections to "producers." As such, a retailer of wine is protected by *Granholm* only if it is also vertically integrated into production of the wine that it sells even if distribution through a retailer would be more efficient. Neither *Granholm*'s logic nor the dormant Commerce Clause compel the vertical integration of production and retailing to gain the protection of the dormant Commerce Clause.

Second, rather than applying the two-step analysis mandated by *Granholm*, the Fifth Circuit began and ended its analysis with the dicta in *Granholm* that the three-tier system is "unquestionably legitimate." 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). The Fifth Circuit, finding that discrimination is inherent in the three-tier system, read this passage as endorsing discrimination against out-of-state retailers.

Third, the Fifth Circuit's opinion fails to properly consider the constitutional and economic purposes of the dormant Commerce Clause and the need to limit evasion of this Court's *Granholm* decision by states and interest groups seeking to erect discriminatory barriers to interstate commerce. These three misapplications of *Granholm* and the dormant Commerce Clause underscore the need for this Court to reaffirm *Granholm* in order to guarantee the benefits of the dormant Commerce Clause and to prevent further efforts to erect discriminatory barriers to interstate commerce.

3. *Granholm* expressly recognized the economic value of vigilant enforcement of the dormant Commerce Clause against discriminatory trade barriers. *Granholm* has mitigated but has not eliminated the central economic problem identified there: wholesaler consolidation and barriers to entry creating a bottleneck hampering the distribution of wine, especially the ever-growing number of small wineries seeking to bring their products to market. Permitting out-of-state retailers to compete on equal terms with in-state retailers will allow a more efficient system of distribution, reduce prices and increase variety for consumers, and enhance competitive opportunities for America's small wineries.

ARGUMENT

I. The Decision Below Undermines the Dormant Commerce Clause By Improperly Limiting *Granholm* to "Producers" and Consumers Who Buy Directly from Producers

The decision below rests on the flawed premise that *Granholm* applies only to "producers" and not to any other elements of the three-tier system. *See Wine Country Gift Baskets*, 612 F.3d at 818 ("The discrimination that *Granholm* invalidated was a State's allowing its wineries to ship directly to consumers but prohibiting out-of-state wineries from doing so . . . . Such discrimination—among producers—is not the question today."); *id.* at 820 ("*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries.") This reading would foreclose more efficient systems of alcohol distribution, resulting in harm to consumers, small wineries, and interstate commerce.

Even a cursory reading of *Granholm* reveals that it focuses on "producers" simply because the plaintiffs in that case happened to be out-of-state producers and the state law in question was designed to benefit local producers. But its language and logic are not limited to producers. And for good reason. The dormant Commerce Clause protects not producers, but *commerce*—buying and selling—across state lines. Whether a retailer is also vertically integrated to production is immaterial to this protection.

Simply put, there is no basis in logic, economic reasoning, or constitutional law to justify an artificially narrow reading of *Granholm* that protects only "producers." By focusing on the identity of the seller of a product, the decision below ignores the fundamental principle of the dormant Commerce Clause—to promote consumer welfare and supplier competition in a national market unencumbered by discriminatory trade barriers. *See Granholm*, 544 U.S. at 473 ("Laws of the type at issue in the instant cases contradict the[] principles [of the dormant Commerce Clause]. They deprive citizens of their right to have access to the markets of other States on equal terms.")

Furthermore, *Granholm* did not merely establish Commerce Clause protections for wine producers, but also for *consumers and sellers* to transact free of discriminatory state regulation. As the Court explained at the outset of its opinion, "States may not enact laws that burden out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses." *Id.* at 472 (emphasis added). This Court only mentioned the plaintiffs' status as "producers" because the particular Michigan and New York laws in question exempted in-state producers from sales restrictions those same laws imposed upon out-of-state wine producers. That the out-of-state sellers in that case also happened to produce the products that they sold was coincidental to *Granholm*'s conclusion. The relevant question instead is rather whether similarly-situated sellers of a product were being treated

in a non-discriminatory manner.[2] Nothing in *Granholm* or any other case supports the Fifth Circuit's contention that only production *combined with* retail sale is protected by the dormant Commerce Clause.

Under the Fifth Circuit's logic, a producer would lose the dormant Commerce Clause's protection if it decided that it would be more efficient to sell to consumers via a retailer instead of directly distributing its own products. Distribution through a professional retailer provides multiple economic benefits which redound to consumers. Retailers develop expertise in marketing and selling wine to consumers that individual wineries may lack, especially smaller wineries. Retailers have economies of scale in marketing, order fulfillment, and tax and regulatory compliance that allow them to sell to consumers at lower expense and with greater efficiency than small wineries. Specialty retailers may also be a credible source of product information to consumers. These benefits provide consumers with greater choice, reduced prices, and reduced information costs in choosing and purchasing wine products. All of these benefits of the ability to use professional retailers to market products are of particular benefit to smaller wineries and, in turn, to wine consumers.

Under the Fifth Circuit's flawed theory, however, the dormant Commerce Clause protects only consumers seeking to buy products *produced by the seller* from whom the consumer wishes to purchase. This

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[2] *See Freeman*, __ F.3d at *8 (holding that out of state producers that sell wine "at retail to consumers" must be treated on equal footing as in-state producers that sell wine "at retail to consumers").

would imply, for example, that *Granholm* protects a consumer sending a gift basket of wine or enrolling in a "wine of the month" club—but only if the order itself is to be fulfilled by one winery filling its own order. This proposed constitutional limitation begs questions. Would two small wineries that banded together to offer gift baskets that combine their wines into one basket be protected from state-sanctioned discrimination? Would three wineries within a marketing cooperative to jointly market and fulfill orders for their products be protected? Presumably under the Fifth Circuit's opinion, all commercial arrangements other than a single retailer vertically integrated from production of wine to retail sale would fall outside *Granholm* because each individual winery was not receiving and fulfilling each individual order, even if a third party could do so at lower cost and higher consumer value.

Nothing in *Granholm* compels this absurd result. The dormant Commerce Clause does not require vertical integration for its protections. Indeed, this Court has emphasized that "the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994). There is nothing in the dormant Commerce Clause that conditions non-discriminatory access to markets on adopting a specific mode of business organization or method of distribution.

II. The Decision Below Improperly Dispenses With *Granholm*'s Two-Step Dormant Commerce Clause Analysis

The Fifth Circuit erred in reading *Granholm* as endorsing all three-tier systems as "unquestionably legitimate," even those that discriminate against out-of-state shippers. Under *Granholm*, however, the Court is required to apply a two-step process of analysis that is designed to protect interstate commerce by ensuring that discriminatory barriers to interstate commerce in alcohol are justified. This analysis begins with a determination of whether the discrimination was necessary to effectuate the state's regulatory scheme. Only afterwards may the court consider whether the Twenty-First Amendment saved the discriminatory regulation.

This analysis is the same whether the product in question is fresh grapes or grapes that have been vinted into wine. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). When a state enacts a discriminatory regulatory regime governing alcohol, the state must justify the discrimination as necessary to the fulfillment of legitimate regulatory purposes. Texas's regulatory regime discriminates against out-of-state wineries and merchants.

Yet, the Fifth Circuit began and ended its analysis with *Granholm*'s dicta dubbing the three-tier system "unquestionably legitimate," *Granholm*, 544 U.S. at 489, in the abstract. The court did not consider the discriminatory nature of the state regulation much less whether it was justified. Because it was part of a three-tier system, the court found it insulated from the application of the dormant Commerce Clause.

Notably, the Fifth Circuit erroneously concluded that discrimination at the retail level is integral to the three-tier system. The Fifth Circuit thereby characterized this case as a frontal challenge on the validity of the entire three-tier system itself. But discrimination is not inherent to the operation of the three-tier system. As Petitioner notes, several states operate three-tier systems without discrimination. *See* Brief for Petitioner at 13. There is nothing inherent in the three-tier system that would justify allowing in-state retailers but not out-of-state retailers to accept remote orders and fulfill them by delivery.

As the Court recognized in *Granholm*, the purpose of Section 2 of the Twenty-First Amendment was the same as the purpose of the Wilson and Webb-Kenyon Acts that preceded it: to allow the state police power to regulate alcohol moving in interstate commerce to the same extent as alcohol in intrastate commerce but subject to the limitation that states could not erect discriminatory barriers. *Granholm*, 544 U.S. at 484-85. The Twenty-First Amendment, like its predecessors the Wilson and Webb-Kenyon Acts, intended to grant the states regulatory *parity* – to prevent states from having to treat out-of-state retailers of alcohol on *more favorable* terms than in-state vendors, not to permit plenary authority to discriminate against interstate commerce. Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J. LAW & LIBERTY 609 (2005).

The three-tier system may be, as a starting point, "unquestionably legitimate." But this does not authorize states to violate the Commerce Clause any more than it would authorize a state to violate any

other Constitutional protection as part of the implementation of the three-tier system. *See* Zywicki & Agarwal, *supra*, at 639-40. While some early cases suggested that the Twenty-First Amendment essentially repealed the dormant Commerce Clause as it applied to interstate commerce in alcohol, those same cases asserted that the Twenty-First Amendment also protected state alcohol regulation from scrutiny under the Fourteenth Amendment. *See Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 64 (1936) (rejecting Equal Protection challenge to state alcohol regulation as "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.") As this Court has subsequently and repeatedly recognized, the Twenty-First Amendment no more deprives citizens of the dormant Commerce Clause's protection from discrimination than it protects them from discrimination under the Fourteenth Amendment. *See Craig v. Boren*, 429 U.S. 190 (1976) (holding that "the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case").

The decision below thus rests upon fundamental doctrinal and conceptual errors that sharply undermine the dormant Commerce Clause. Review is warranted so that this Court preserve the protections of the dormant Commerce Clause for consumers and wineries and prevent evasion of *Granholm* by interest groups and state legislatures.

III. The Failure of the Fifth Circuit To Properly Apply *Granholm*'s Two-Step Analysis Will Encourage Protectionist Regulation, Harm Consumers, and Harm Interstate Commerce in Violation of the Constitution

The Fifth Circuit's failure to properly conduct *Granholm*'s two-step analysis injures consumers and the economy by undermining the integrated national economy the dormant Commerce Clause protects. Application of the two-step analysis required by *Granholm* is necessary in order to prevent evasion of the dormant Commerce Clause's anti-discrimination mandate thereby ensuring that laws further regulatory, not protectionist, purposes. Insulating the whole three-tier system from judicial review invites circumvention of this Court's *Granholm* decision through legislative gerrymandering. The only relevant question left for states would be how to plausibly label all manners of discriminatory interstate protectionism as essential to the three-tier system.

This threat is especially dangerous in the area of alcohol regulation, where as Nobel Laureate Daniel McFadden has observed, the political economy of state legislative and regulatory process systematically disadvantage the interests of consumers and out-of-state suppliers relative to those of wholesalers. *See* Daniel L. McFadden, E. Morris Cox Professor of Econ., Univ. of Cal., Berkeley, Interstate Wine Shipments and E-Commerce 2, *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mcfadden.pdf ("I find it particularly sad that the anti-interstate shipping legislation that has been passed is so disproportionate in its negative impact on consumers relative to the very modest protection it provides to traditional distributors and retailers.").

Absent rigorous scrutiny by federal courts, wholesaler-dominance of the legislative and regulatory processes will result in rampant evasion of the Court's holding in *Granholm* and significant welfare losses imposed upon consumers.

A. By Refusing to Rigorously Scrutinize Discriminatory Regulation, the Fifth Circuit's Opinion Encourages Special Interests and State Politicians to Evade Granholm's Mandates.

Interest groups and state legislatures have worked ceaselessly to undermine *Granholm*. Legislatures have developed several types of camouflage to salvage discriminatory regimes. The Fifth Circuit's opinion will greatly simplify this process: every discriminatory element that a state asserts as essential to its three-tier regulatory regime would be deemed "unquestionably legitimate." Indeed, the Fifth Circuit's interpretation renders *Granholm* itself a near-nullity, enabling direct shipments of wine directly from producers to consumers, but providing no other limits on regulations of a myriad of economically similar transactions (as noted above). It is essential for this Court to reaffirm the importance of *Granholm* to limit these evasions.

In 2007, two officials of the Federal Trade Commission undertook a comprehensive review of state legislative responses in the wake of *Granholm* and the negative impact those evasions continued to have on consumers and interstate commerce. Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-*Granholm *Developments in Wine Direct Shipping and Their Implications for Competition*, 75 AN-

TITRUST L.J. 505 (2008). As Ohlhausen and Luib note, in the wake of *Granholm*, several states invented new restrictions on direct shipping that typically fall more heavily on out-of-state producers. These included restrictions such as on-site purchase requirements and production limitations.[3] In some cases, these new restrictions "effectively make direct shipping by out-of-state wineries economically impossible." Ohlhausen & Luib, *supra* at 506. They note that "[r]estrictions on direct shipping, including those enacted in the wake of *Granholm*, have adverse effects on consumers of wine. Such restrictions prevent consumers from conveniently purchasing many popular wines and from reaping significant price savings on some wines. Further, direct shipping fosters competition between online and offline sellers of wine—even if consumers choose to buy wine from bricks-and-mortar retailers." *Id.* at 506. They conclude that "[a] Commerce Clause challenge may be the only practical way to attack these restrictions and protect the interests of producers and consumers in enjoying the benefits of a competitive, national market." *Id.* Moreover, they warn that the failure of this Court to protect consumers and interstate commerce

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[3] *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) illustrates the importance of judicial vigilance to prevent evasion of the dormant Commerce Clause. In 2006 Massachusetts enacted a facially neutral law that created distinct distribution regimes for "small" and "large" wineries, as defined by output of more or less than 30,000 gallons per year. While facially neutral, the First Circuit recognized that no Massachusetts winery produced more than 30,000 gallons per year. The First Circuit thereby invalidated the state law under *Granholm* as discriminatory in effect.

from these evasions will invite further surreptitious trade barriers erected to protect in-state merchants from out-of-state competition.

As this legislative response to *Granholm* indicates, state legislatures are highly prone to erecting harmful discriminatory barriers to interstate commerce. Consumer interests tend to be systematically underrepresented in political processes as consumers are subject to collective action and free-riding problems. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). By contrast, wholesalers present a cohesive, well-organized lobbying machine. Such an asymmetry in lobbying power increases the threat of protectionist legislation motivated by wholesaler special interest groups. Thus, allowing states to authorize alcohol cartels enables financially interested firms to reap cartel profits at the expense of consumers, often in ways that do not materially further any legitimate interest of the state.

Studies of state alcohol markets confirm these suspicions. In most states, wholesalers and state governments combine to impose losses on consumers to increase both profits and tax revenues. *See* James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post and Hold Laws on Consumption and Social Harms* (Fed. Trade Comm'n, Working Paper No. 304, August 2010) (demonstrating that state post and hold regulations result in a reduction in consumer welfare with no offsetting reduction in the social harms associated with alcohol consumption), *available at* http://www.ftc.gov/be/workpapers/wp304.pdf; Gina M. Riekhof & Michael E. Sykuta, *Politics, Economics,*

and the Regulation of Direct Interstate Shipping in the Wine Industry, 87 AM. J. AGRICULTURAL ECON. 439 (2005); Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, 27 No. 3, REG. 30 (2004). Riekhof and Sykuta conduct an empirical analysis of state wine direct shipping "reciprocity" laws to find that interest-group struggles and tax revenues primarily determine state alcohol regulatory policies. In a few states, the domestic wine industry is sufficiently strong and well-organized that it can sometimes exert a counter-weight to anti-consumer wholesaler interests. Riekhof and Sykuta find that consumer interests predominate in absolutely no states. When a state lacks a large wine-producing sector that can provide a political counterweight to wholesaler interests, however, consumers are at the mercy of wholesaler interests.

By limiting the capacity of states to engage in discriminatory regulation, a primary function of the dormant Commerce Clause is to temper the ability of local interest group factions to weaken national markets and erode individual liberty. THE FEDERALIST No. 10 (James Madison). Discriminatory laws transfer wealth to small, cohesive special interests at the expense of millions of consumers that are hard to organize politically and out-of-state sellers that have no ability to vote and limited ability to participate in state political processes. These trends reflect the grim reality that discriminatory interstate laws tempt politicians to reward special interest groups at the cost of consumer welfare. These forces underscore the need for vigilance by this Court to prevent interest-group motivated evasions of the dormant

Commerce Clause. *See* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

B. By Failing to Rigorously Scrutinize Protectionist State Regulation, the Fifth Circuit's Opinion will Result in Substantial Harm to Consumers, Out-of-State Sellers, and Interstate Commerce.

This Court's decision in *Granholm* produced major economic benefits for consumers and the economy and led to a blossoming of smaller wineries by freeing new producers from an innavigable and shrinking bottleneck of wholesalers. As noted in *Granholm*, between 1984 and 2002 the number of licensed wholesalers nationwide dropped from 1,600 to 600 while the number of wineries had grown to over 3,000. *Granholm*, 544 U.S. at 467. Since *Granholm*, the number of wineries has increased to over 6,000, *see Growth of the U.S. Wine Industry*, http://www.wineamerica.org/newsroom/wine%20data%20center/2010-Growth-of-US-Wine-Industry.pdf (last visited Dec. 19, 2010), suggesting that discriminatory state regulation was a significant and binding constraint on competition and consumer choice in the wine market. By contrast, some industry analysts claim that the wholesaler industry has become even more consolidated and concentrated since then. Peter Zwiebach, *Consolidation Marches on as Leading Players Expand*, IMPACT: GLOBAL NEWS AND RESEARCH FOR THE DRINKS EXECUTIVE, Apr. 15-May 1 2009, at 1, 22. One indication of the wholesaler's regulatorily-preferred position is that while the return on equity (an accounting measure of profitability

used by many investors) in less-protected wholesale industries averages 11 percent a year over the past 10 years, the return in alcohol wholesaling ranges from 18-20 percent, 66 to 83 percent higher. *See* Wayne T. Brough, *No Wine Shall be Served Before Its Time—At Least Not Without Wholesalers Taking a Cut*, Issue Analysis, July 14, 2010.

As the Federal Trade Commission has noted, by expanding efficiency, competition, and consumer choice, further breaking down discriminatory barriers to retailing will expand the benefits that were seeded by *Granholm*. *See* Letter from Fed. Trade Comm'n Staff to William Magee, Chairman, N.Y. Assembly Agriculture Comm. (Mar. 29, 2004) (observing that "allowing out-of-state retailers, as well as wineries, to ship directly to consumers would provide additional competition that likely would lead to even lower prices for such consumers"), *available at* http://www.ftc.gov/be/v040012.pdf. Direct shipment by out-of-state retailers enables small and medium wineries to distribute their products to retailers who can then sell and ship a greater variety of products to consumers. These retailers will otherwise struggle to find distribution as a result of the wholesaler bottleneck. This will naturally expand the economic benefits created by *Granholm*, leading to lower prices, broader selection, and greater consumer convenience. Just as Internet and catalogue shopping have revolutionized other areas of retail-shopping for the benefit of consumers, prying open previously closed markets to allow heightened competition by out-of-state retailers holds the potential for vast consumer welfare gains.

The products sold by the plaintiff in the current case, Wine Country Gift Baskets.com, illustrate the potential gain to consumers and small wineries from eliminating arbitrary and protectionist restraints on competition. Wine Country Gift Baskets.com and other similar retailers market, sell, and ship gift baskets to consumers around the country. They accept orders around the clock through their website, assembling baskets of wines, cheeses, chocolates, and other items. They offer a variety of baskets designed for particular occasions, such as at birthdays, anniversaries, births, and other celebrations. By providing innovative product selections in a national market, sellers such as plaintiff increase the competitive pressure on bricks and mortar wine retailers, increasing product variety and convenience while lowering prices.

Less balkanized markets will also have beneficial dynamic effects. By reducing barriers to entry, increasing competition, and facilitating the free flow of goods across state lines, expanding trade will promote still greater entrepreneurship, innovation, quality improvement, and choice. Undistorted competition allows the best products and sellers to prevail, not just those most able to navigate the wholesalers' stranglehold on the marketplace. These open conditions lead to economic growth in the marketplace which, in turn, enhance competition and increase state tax revenues.

Volumes of economic and empirical evidence demonstrate that online retailers are an important competitive force. In many product markets, online retailers offer lower prices than offline retailers. Even

where online retailers do not offer a price advantage, they generate other important competitive benefits for consumers by reducing price dispersion or offering services. *See, e.g.*, Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*. 46 MANAGEMENT SCIENCE 563, 563 (2000) (observing that prices on the Internet are 9–16% lower than prices in conventional outlets); Dennis Carlton & Judith Chevalier, *Free Riding and Sales Strategies for the Internet*, 49 J. INDUS. ECON. 441 (2001); Karen Clay et al., *Prices and Price Dispersion on the Web: Evidence from the Online Book Industry*, 49 J. INDUS. ECON. 521 (2001). Furthermore, competition drives down prices for *all* sellers in a market – even amongst traditional brick-and-mortar stores that must reduce prices and improve quality in order to compete against electronic counterparts. By reducing search costs competition from Internet retailers tends to reduce price discrimination, promoting lower and more uniform pricing. These gains flow almost entirely to consumers, permitting greater quantities to be purchased at lower costs.

Increased competition for wine generates the same beneficial effects. As part of the Federal Trade Commission's 2003 study on *Possible Anticompetitive Barriers to E-Commerce: Wine*, in 2002 Jerry Ellig and Alan E. Wiseman conducted a study of competition in the consumer wine industry in Northern Virginia and the effects of state regulatory barriers to direct shipping of wine. FTC Report at Appendix A; *see also* Jerry Ellig & Alan E. Wiseman, *Interstate Trade Barriers and Potential Regulatory Competition:*

The Case of Direct Wine Shipping, 19 J. PRIVATE ENTER., no. 2, 2004, at 26 (noting and subsequently publishing 2002 Ellig and Wiseman findings). Prompted by an adverse judicial decision by the United States Court of Appeals for the Fourth Circuit, in 2003 Virginia amended its law to permit direct wine shipping from out-of-state sellers. In 2004, soon after the Virginia law was enacted, the authors conducted a follow-up study that compared the price and availability of popular wines in local wine retailers and compared those findings to the study conducted in 2002, before the law was enacted. *See* Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 J. POLITICS. 859 (2007).

Wiseman and Ellig's follow-up study drew several relevant conclusions. First, they found that of the total of 152 popular labels included in the two studies combined, only 1 was not available at any online retailer while 21 were unavailable at any local bricks-and-mortar store. In 2002, 15% of the wines in the study were available online but not offline, and in 2004, 12.5% of the wines were still available online but not offline. Wiseman & Ellig, *supra* at 866. Of the wines not available offline in 2002, 8 of the 15 came from among the 20 most popular labels in *Wine and Spirits*' restaurant poll. FTC Report at 18. In both periods there were many popular wines that were unavailable offline but were available online.

Wiseman and Ellig found that in 2002, there were substantial savings to be had from purchasing online: consumers saved an average of 8-13% on wines costing more than $20 per bottle and an average of 20-

21% on wines costing more than $40 per bottle. FTC Report at 3.

In their 2004 follow-up study, Wiseman and Ellig found that the legalization of online wine shopping changed the competitive structure of the Northern Virginia wine market, leading to lower prices for consumers *both online and offline.* As economic theory predicts, the 2004 Virginia law reduced barriers to entry, leading to increased competition and consumer choice. While Wiseman and Ellig found that online wine prices were lower than offline prices in both 2002 and 2004, the offline-online price differential was 40% smaller in 2004 than 2002, indicating that the threat of online competition led to lower prices offline as well. Wiseman and Ellig conclude that "[c]onsistent with the intentions of the dormant [C]ommerce [C]lause, removal of Virginia's direct shipment ban increased competition in local markets." Wiseman & Ellig, *supra*, at 870.

Ellig and Wiseman's most recent research shows that opening competition to direct shipping by retailers as well as wineries would enhance competition and drive down consumer prices still further—and that excluding retailers from direct shipment substantially reduces the price savings available from online competition. *See generally* Jerry Ellig & Alan E. Wiseman, *Competitive Exclusion with Heterogeneous Sellers: The Case of State Wine Shipping Laws* (Mercatus Center, George Mason Univ., Working Paper, Dec. 21, 2010).

Moreover, Wiseman and Ellig's study actually understates the full benefit to consumers and the economy of online shopping. Online shopping provides a

consumer with the ability to shop at their convenience, day or night, from the comfort of their own home, rather than being required to run around town seeking particular wines or comparing prices. Consumers benefit from the convenience of the option of placing remote orders and accepting direct shipment—which is precisely why Texas, like many other states, allows retailers to do exactly that. Consumers also benefit from innovative retailers such as Wine Country Gift Baskets.com that increase the variety of products available to consumers or specialized wine merchants that feature wines of particular varietals or geographic regions. These effects save consumers time, money, and hassle, increasing consumer satisfaction, encouraging marginal consumers to enjoy wine, and providing drastic price savings to inframarginal consumers as well. By creating virtual retail shelf-space, online shopping dramatically reduces the search and transaction costs of finding and purchasing products, allowing customers to find the best price and quality.

C. Once the Court Identifies a Facially Discriminatory Regulation, the Burden is on the State to Justify the Regulation and the Necessity of Discrimination.

Under *Granholm*, once the Court identifies a facially discriminatory regulation, the burden shifts to the state to justify the necessity of the discriminatory regulation. *Granholm*, 544 U.S. at 489-90 ("The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscri-

minatory alternatives will prove unworkable."). The state here apparently offers the same three basic rationales for its discriminatory regime as in *Granholm*: preventing underage access to alcohol, ensuring taxation, and the promotion of "orderly markets."

As recognized in *Granholm*, however, there is little basis for believing that economic discrimination is necessary to accomplish the state's regulatory goals. *Granholm*, 544 U.S. at 490; *see also* FTC Report at 34-41. Following *Granholm*, some states and wholesalers direly predicted that they needed the power to erect discriminatory barriers to direct shipment of wine to forestall an epidemic of underage access to wine. No such floodgate has opened—in fact, a recent study found that underage drinking has reached the lowest point in the study's 35 year history. *See* Press Release, L.D. Johnston et al., Univ. of Mich., Marijuana Use is Rising; Ecstasy Use is Beginning to Rise; and Alcohol Use is Declining Among U.S. Teens (Dec. 14, 2010), *available at* http://monitoringthefuture.org/data/10data.html#2010data-drugs. As this Court recognized in *Granholm*, and as subsequent experience has demonstrated, the apocalyptic warnings about the consequences of striking down discriminatory barriers to direct shipping were then, and are today, highly implausible. Now, as then, underage drinkers will usually find ample opportunity to try to acquire alcohol from bricks-and-mortar vendors without the delay, difficulty, and risk of ordering over the Internet for delivery. *See* FTC Report at 35.

Moreover, whatever the strength of Texas's justifications for its regime, there is no reason to assume

that its need to discriminate is greater for regulating retailer direct shipping than winery direct shipping. As the Federal Trade Commission has recognized, the same means used to regulate direct shipment by wineries can be used to ensure regulatory compliance by retailers, including labeling, adult signature requirements, and reporting requirements. *See* Letter from Fed. Trade Comm'n Staff to William Magee, Chairman, N.Y. Assembly Agriculture Comm. (Mar. 29, 2004). As recognized in *Granholm*, "minors are just as likely to order wine from in-state producers as from out-of-state," *Granholm*, 544 U.S. at 490—an observation that applies equally to shipment by retailers. *Id.* ("Michigan, for example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers."). Regulation of direct shipment by retailers does not present any distinct regulatory issues from regulation of direct shipment by wineries. The prospect of retailer direct shipment no more requires state discrimination against interstate commerce than regulation of direct retail sales by wineries does.

The dormant Commerce Clause requires that the state provide a justification for its discriminatory regulations. Rather than requiring this justification to be made, the Fifth Circuit assumed that discrimination was warranted and excused the state of Texas from providing that justification to consumers and the public at large. This Court's guidance is necessary to vindicate the protections of the dormant Commerce Clause and to ensure that discriminatory barriers to interstate commerce are justified.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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No. 10-671

IN THE
Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM,
K&L WINE MERCHANTS, BEVERAGES & MORE, INC.,
DAVID L. TAPP, RONALD L. PARRISH,
JEFFREY R. DAVIS,

Petitioners,

v.

JOHN T. STEEN, JR., GAIL MADDEN, JOSE CUEVAS, JR.,
ALLEN STEEN, GLAZER'S WHOLESALE DRUG CO., INC.,
REPUBLIC BEVERAGE CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE SPECIALTY WINE RETAILERS OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 22, 2010

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Other Authorities

Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 7 (July 2003) 3

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STATEMENT OF INTEREST

Amicus Specialty Wine Retailers Association is a nonprofit trade association that represents the interests of specialty wine retailers and the consumers they serve across the United States.[1] Its membership includes classic brick-and-mortar-wine merchants, Internet-based wine retailers, wine cataloguers, auction retailers, mass-market merchants, and wine lovers who support and patronize these respective types of sellers. *Amicus*' view, advanced through litigation and lobbying, is that the national market for wines should be truly national in scope and operation – in particular, that the selection of wines available to consumers in a given state should be no less rich and expansive than the full panoply of wines available around the country.

As the Internet increasingly transcends geographic boundaries and as American consumers' wine appreciation and sophistication grow as never before, fine wines are available from specialty retailers in unprecedented quality and breadth. *Amicus*' interest in this case is to see the channels of interstate commerce freed of discriminatory barriers such as the law challenged in this case, so that oenophiles in Texas and other states have full access

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of Specialty Wine Retailers of America's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

to the wines available by direct shipment from specialty retailers across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court observed in *Granholm v. Heald*, 544 U.S. 460, 467 (2005), the direct shipment of wine to consumers from out-of-state sources has grown rapidly in recent years. The reasons for this, the Court noted, include the dramatic increase in the number of small wineries in this country,[2] coupled with an equally pronounced consolidation of liquor wholesalers. *See id.* Because of these twin developments, many wines are produced in insufficient quantities, or lack sufficient consumer demand, to attract wholesaler representation. *See id.*

The predictable result has been that many of the nation's wines are unavailable in local brick-and-mortar wine stores. Sellers have therefore turned to the Internet, offering remote purchase and direct shipment options to consumers who cannot purchase a desired label locally. As the Federal Trade Commission has stated, in a study relied on by the *Granholm* Court, consumers can "reap significant benefits" when given "the option of purchasing wine online from out-of-state sources and having it shipped directly to them" – benefits including a far

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[2] Overall wine production has increased considerably in recent years; in California alone, the total retail value of wine produced went from $12 billion in 1998 to $17.9 billion in 2009. *See* Wine Institute, 2009 Wine Sales, available at http://www.wineinstitute.org/resources/statistics/article122 (last visited on December 16, 2010).

greater selection of wines, and lower prices resulting from competition. Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 7 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited on December 18, 2010) ("FTC Report"), cited in *Granholm*, 544 U.S. at 467.

Significantly, in highlighting the importance of the rise of the direct shipment from out-of-state "sources" (or "suppliers"), the FTC Report did not distinguish between wine *producers* that offer direct shipment and wine *retailers* that do the same thing. And this for two very good reasons. First, there is the obvious, and too-often overlooked, fact that producers *are acting as retailers* when they sell directly to consumers. For example, when a California winery sells and ships wine to a consumer, it does so not under its producer's license, but under its license as a retailer in California.

Second, and less well known but no less important, is fact that specialty retailers *who do not produce wine* play a major role in the direct-shipment market, because not all wine producers do or can make their products available to consumers for direct shipment. In some instances, wineries make special limited-edition labels of their very finest stock, which they sell only to select wholesalers and do not make available directly to consumers; in other instances, they long ago sold out their stock of some older, perhaps especially sought-after, vintages, and so are unable to ship the wine in question to consumers.

Specialty retailers, such as *Amicus*, make it their business to fill this marketplace gap. Located

around the country, their expert buyers purchase rare or sought-after foreign and American labels and vintages from their own states' wholesalers, and often stock hundreds or thousands of difficult-to-find varieties. Then, to the extent allowed by law, they make these wines available on their websites for direct shipment to purchasers across the country who frequently cannot find the wines at local retailers – or, indeed, at retailers anywhere in their own state. In this way, the possibility of direct shipment from specialty retailers hugely increases the selection of wines available to consumers.

Often, the wines stocked by specialty retailers are very scarce, difficult and expensive to store properly, and by no means fungible from the consumer's point of view. For example, a rare 1985 Napa Valley Beaulieu Vineyards Georges de Latour Cabernet Sauvignon Reserve that is available from one such retailer is unlikely to be available from another; and a consumer intent on purchasing, say, a 1990 Napa Valley Harlan Estate, a much sought-after wine not sold to most wholesalers by the winery, may find only one or a handful of retailers anywhere in the United States positioned to sell it at any given time. The closest retailer with the desired product may be halfway across the country or more, making shipment by UPS or FedEx the only feasible way for the consumer to obtain the product. Thus, for specialty wine retailers and the oenophiles they serve, unfettered access to the national market is essential. To the extent that interstate access to wine retailers is restricted, many wines available in one state are made unavailable to consumers in other states.

Unfortunately, a number of states have erected protectionist barriers around their direct-shipping markets, enacting laws that permit in-state wine sources to ship directly to consumers in the state, while denying that same right to out-of-state sources. These discriminatory laws have generally taken two forms: laws that protect domestic *producers*, allowing in-state but not out-of-state wineries to ship their products directly to consumers; and laws, such as the Texas statutes at issue here, that protect domestic *merchants*, allowing in-state but not out-of-state retailers to ship directly to consumers.

The immediate concern of the *Granholm* decision was state laws of the first, producer-targeted type: at issue in that case were Michigan and New York laws that generally offered direct-shipment licenses to in-state wine-makers but not to out-of-state wine-makers. In its powerful opinion, the Court held that the states' powers under § 2 of the Twenty-First Amendment did not override other provisions of the Constitution, notably the Commerce Clause's prohibition on laws that discriminate against interstate trade. *Granholm*, 544 U.S. at 486. According to the Court, the challenged laws violated the fundamental precept that states "cannot deprive citizens of their right to have access to the markets of other States on equal terms" and "may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Id.* at 473, 472.

The present case concerns a discriminatory law of the second type, in which the state has

disadvantaged out-of-state *merchants* rather than producers of wine.[3] Under the Texas Alcoholic Beverages Code, in-state wine retailers are free to take orders "by mail, or by telegraph or telephone," and to directly ship the ordered products to consumers in their county, as well as to consumers outside the state. *See* Tex. Alco. Bev. Code §22.03(a), 24.03. In contrast, out-of-state retailers are expressly prohibited from selling or shipping wine to Texas consumers: anyone (other than a licensed winery) who "sells and ships alcohol from outside Texas to an ultimate consumer in Texas" commits a punishable offense. Tex. Alco. Bev. Code § 54.12. Thus, under Texas law, *in-state* retailers are allowed to remotely sell and ship wine to Texas residents, as well as to out-of-state purchasers. But *out-of-state* retailers are barred from selling and shipping to Texas residents. That is to say, Texas allows *its own* retailers to participate in the nation's market for remote sale and shipment, while at the same time keeping *other states'* retailers from reaching Texas consumers.

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[3] The Texas laws at issue in this case are remnants of a systematic pattern of alcohol regulations discriminating against out-of-state businesses, most of which have been struck down and are not now before this Court. These include laws banning direct durational residency and citizenship requirements for retailers and wholesalers (struck down, respectively, in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), and *Southern Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp.2d 626 (W.D. Tex. 2007), as well as a law allowing direct shipment by in-state, but not out-of-state, wineries (struck down *Dickerson v. Bailey*, 336 F.3d 388, 409 (5th Cir. 2003)).

The impact of such discriminatory treatment should not be underestimated. As the District Court below observed, millions of people reside in Harris County, Texas, whose population exceeds that of 24 states. *See* District Court opinion, reproduced in Appendix to Petition for Certiorari ("App.") at 83a (citing U.S. Census Bureau, 2006 Population Estimates, http://www.census.gov). Under Texas law, a retailer located in that county would be able to take remote orders and make direct shipments throughout that sizeable market, while out-of-state retailers are completely barred from doing the same thing.[4]

The *Granholm* Court, having before it only the issue of direct shipment by *wineries*, had no occasion to address the constitutionality of discriminatory laws concerning direct shipment by retailers. Yet *Granholm*'s sweeping, unambiguous language condemning laws that "burden out-of-state producers *or shippers*," 544 U.S. at 472 (emphasis added), leaves little doubt as to how the Court would have viewed a law like the Texas code provision under review, which facially discriminates against out-of state shippers. As *Granholm* explained, "[s]tate laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity," 544 U.S. at 476

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[4] It is of no constitutional import that direct-shipping permits available to Texas retailers are granted on a county-by-county rather than a state-wide basis. *See C&A Carbone, Inc., v. Clarkstown*, 511 U.S. 383, 391 (1994). The crucial fact is that only in-state retailers are given access to the state's direct-shipping market. However, the size of the Harris County market is an indicator of the competitive advantage the state gives its own retailers.

(internal quotation omitted); this is a rule that applies to the trade in alcoholic beverages as much as for any other article of commerce. *See id.* at 486-88 (reviewing decisions to this effect); *id.* at 488 (quoting separate opinion of SCALIA, J. in *Healy v. Beer Institute*, 491 U.S. 324 (1989)) (a "statute's invalidity is fully established by its facial discrimination against interstate commerce.... This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-First Amendment").

Astonishingly, however, the Fifth Circuit in its ruling below read the *Granholm* opinion as *endorsing* discrimination of the type found in the Texas statute. Seizing on language in *Granholm* generally approving of three-tier distribution systems that treat wine *producers* evenhandedly, the Fifth Circuit reached the extraordinary conclusion that Texas is therefore free to discriminate against out-of-state *retailers*.[5] Contrary to this Court's "virtually *per se* rule of invalidity" for state laws that

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[5] In so ruling, the Fifth Circuit followed a recent Second Circuit decision also upholding a law granting remote-sale and direct-shipment licenses to in-state, but not out-of-state, retailers. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190-91 (2nd Cir. 2009) (holding challenge to the law "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system"). The opposite conclusion was reached by the district court in a challenge to an essentially identical Michigan law. *See Siesta Village Market, LLC v. Granholm*, 595 F.Supp. 1035, 1039 (E.D. Mich. 2008) ("While the [*Granholm*] court did make clear that the three-tiered system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests.")

discriminate against out-of-state commerce, the Fifth Circuit has effectively created a "*per se* rule of validity" for laws that facially discriminate against nonresident wine retailers.

The Fifth Circuit's ruling creates a looking-glass world in which, despite the clear teachings of this Court, the Twenty-First Amendment trumps the Commerce Clause; facially discriminatory laws against out-of-state shippers are valid regardless of whether they serve legitimate interests that cannot be achieved by less discriminatory means; in-state retailers, but not out-of-state retailers, may participate in the state's direct-shipping retail market. This Court should end the doctrinal confusion created by the Fifth Circuit's erroneous standard, and should make clear that *Granholm*'s central holding applies to wine retailers as well as producers: "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," 544 U.S. at 493.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's Refusal to Apply Commerce Clause Scrutiny to Laws Discriminating Against Out-of-State Retailer Wine Shipping Contravenes this Court's Ruling in *Granholm*.

As the District Court below correctly held, the Texas provisions under review "plainly discriminate against interstate commerce," and therefore must be struck down unless they "advance a 'legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" App. 81a, 87a (quoting *Granholm*, 544 U.S. at 489). The

District Court found that the State's proffered rationales for barring out-of-state shipments by retailers – namely, making on-site inspections, discouraging underage drinking, and collecting taxes – were unsubstantiated, just as this Court had found them unsubstantiated as applied to winery shipments in *Granholm*. App. 87a-90a. The District Court could not find, as required by *Granholm*, "'concrete record evidence'" that the "'State's nondiscriminatory alternatives will prove unworkable.'" App. 87a (quoting *Granholm*, 544 U.S. at 492-93).

Yet the Fifth Circuit held that the Texas laws require no such justification – that they "do not need to be saved," in the court's words, by proof of a legitimate purpose and the absence of nondiscriminatory alternatives. App. 36a. *Granholm*'s antidiscrimination rule, the Fifth Circuit reasoned, is limited to laws that burden out-of-state *producers* of wine, that is, erect trade barriers against *products* made out of state. Where other out-of-state wine *sellers* are concerned, in contrast, the rule does not apply. *See id.* at 36a (*Granholm* "concerned wineries, *i.e.*, the producers of the product traveling in commerce," and does not apply to "wholesalers and retailers, [which] are often required by a State's law to be within that State."). In the Fifth Circuit's view, out-of-state alcohol *retailers* can claim no Commerce Clause protection from discriminatory treatment; the standard of review this Court applied in *Granholm* – which, as the Court made clear, is the same standard employed to

any law discriminating against interstate commerce[6] – apparently has no application here.

Indeed, the Fifth Circuit reached the startling conclusion, that *Granholm* is actually *authority* for sustaining the Texas ban on out-of-state retail shipping. *See* App. 49a ("In effect, *Granholm* worked out the answer" that the ban is constitutional.) This, according to the Fifth Circuit, is because Texas uses a three-tier system of alcohol distribution, a structure *Granholm* declared "legitimate under the Twenty-First Amendment." App. 49a. Because – in the Fifth Circuit's view – discrimination against out-of-state retailers is "inherent in the three-tier system itself," App. 44a, there can be no Commerce Clause objection to a ban on out-of-state retail shipping, even if the state permits remote sales and direct shipments by in-state retailers.

Virtually every step in the Fifth Circuit's analysis is contradicted by *Granholm* and other decisions of this Court. First, to the extent the Fifth Circuit suggests that the Commerce Clause's antidiscrimination rule applies only to out-of-state alcohol *producers* but not *merchants*, that proposition is squarely foreclosed by this Court's Commerce Clause jurisprudence. The Commerce Clause prohibits discrimination against interstate *commerce*, not just against out-of-state goods or producers. Laws that are "discriminatory in favor of the local merchant" further the "economic Balkanization that our dormant Commerce Clause jurisprudence has long sought to prevent." *Fulton*

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[6] *See Granholm*, 544 U.S. 489 (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996) (citations and internal quotation marks omitted). Thus, for example, the Court has long held that states may not discriminate against out-of-state retailers, regardless of whether the goods they sell are available from local retailers. *See, e.g.*, *Best & Co., Inc., v. Maxwell*, 311 U.S. 454, 456 (1940) (striking down a tax "required of out-of-state retailers but not of their real local competitors, [which] can operate only to discourage and hinder the appearance of interstate commerce").

This rule applies with equal force to merchants of alcohol. For example, in *Healy v. Beer Institute*, 491 U.S. 324 (1989), a case relied on by *Granholm*, the Court struck down state law that required out-of-state beer dealers to affirm that the prices they charged in Connecticut were no higher than what they charged in neighboring states.[7] *See Healy*, 491 U.S. at 340; *Granholm*, 544 U.S. at 488 (citing *Healy*). The Connecticut statute had nothing to do with discrimination between in-state and out-of-state producers, as there *were* no in-state brewers; it was not *products* that were being treated differently, but their sellers. *See Healy*, 491 U.S. at 326 n.2. The discrimination was between purely in-state dealers, who could charge whatever price they chose, and dealers who also sold out-of-state, who were subject to price restrictions. This was enough for the Court to strike down the statute. *See id.* at 340. The Fifth Circuit's notion that the Commerce Clause's antidiscrimination rule applies to out-of-state

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[7] The dealers in question were not retailers, but importers and brewers.

wineries but not other out-of-state wine merchants has no basis in this Court's cases.

Second, by reading *Granholm*'s approval of three-tier distribution systems as an unqualified license to discriminate against out-of-state retailers, the Fifth Circuit has twisted this Court's decision beyond recognition. *Granholm* describes the three-tier system as "unquestionably legitimate." 544 U.S. at 489. Read in context, however, there is nothing in that passage, or anywhere in the opinion, suggesting that a given state's three-tier system, *no matter how operated*, is exempt from Commerce Clause scrutiny. On the contrary, we can infer from *Granholm*'s reliance on the *Healy* case that the Court meant to imply nothing of the kind. *Healy*, after all, was a successful challenge to a state's operation of its three-tier system: while not questioning Connecticut's three-tier structure itself, the Court exposed to Commerce Clause scrutiny the *operation* of the system, which imposed differential pricing obligations on in-state and out-of-state suppliers. *See Granholm*, 544 U.S. at 488 (declining "invitation" to "undermine" *Healy*).

To be sure, *Healy* involved discrimination against upper-tier suppliers rather than, in the Fifth Circuit's words, "third-tier retailing." App. 46a. In the Fifth Circuit's view, the in-state businesses favored by the law are just "[r]etailers ... acting as retailers and making what conceptually are local deliveries," rendering the law exempt from the standards normally applicable to discrimination against out-of-state sellers. App. 47a. But however the sales are viewed "conceptually," the fact is that the Texas law allows in-state businesses, but not out-

of-state businesses, to take remote orders and ship directly to consumers who may be miles away, just as was the case in *Granholm*. That the businesses are dubbed "retailers" is immaterial to the constitutional principle involved. Whether the target of a law discriminating against out-of-state shipping commerce is termed a producer, distributor, retailer, or something else, Commerce Clause scrutiny nonetheless applies.[8] The standard is familiar, but bears repeating: the state must come forward with proof that the law serves a legitimate purpose that cannot be achieved by less discriminatory alternatives. *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008) (citing cases); *Granholm*, 544 U.S. at 489.

The Fifth Circuit's view that the Texas law need not be "saved" under this standard – that the state's exclusion of out-of-state retailers from the direct shipping market carries no burden of justification at all – creates an exception to this Court's Commerce Clause jurisprudence, an exception of unknown provenance and uncertain contours, when the teaching of *Granholm* seems crystal clear: the state could have banned direct consumer shipping entirely, *i.e.*, insisted on face-to-face exchanges in all retail purchases of alcohol; but having chosen to allow in-state retailers to engage in remote sales and direct shipping to distant consumers, must either

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[8] *Cf. Ring v. Arizona*, 536 U.S. 584, 610 (2002)(Scalia, J., concurring)("all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.")

allow out-of-state retailers to do the same, or come forward with concrete evidence justifying the discrimination.

Third, there is absolutely no foundation for the Fifth Circuit's claim that banning direct shipping by out-of-state retailers is "inherent" to the three-tier system "given constitutional approval" in *Granholm*. The reality is that maintaining a three-tier system is fully compatible with allowing remote sales and direct shipments by out-of-state retailers. Indeed, many states with three-tier systems have done just this, making direct shipper permits available to out-of-state retailers.[9] As with direct shipper permits for out-of-state wineries, these retailer permits require the holder to adhere to a variety of conditions, such as: (1) having authority to sell at retail in their home state; (2) paying taxes to the state to which the wine is being shipped; (3) limiting the quantity of wine sold and shipped to a given consumer per year; (4) ensuring that the carrier verifies that the recipient who signs for the shipment is of legal drinking age; (5) reporting all sales and shipments to state authorities; and (6) making its records available for inspection by state authorities.[10]

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[9] *See, e.g.*, Cal. Bus. & Prof. Code § 23661.2; Idaho Code § 23-1309A; La. Rev. Stat. § 26:359; Mo. Rev. Stat. § 311.462; Nev. Rev. Stat. § 369.490; N.H. Rev. Stat. § 178:27; N.M. Stat. § 60-7A-3; Or. Rev. Stat. § 471.282; Va. Code § 4.1-209.1; W. Va. Code § 60-8-6; Wyo. Stat. § 12-2-204.

[10] These requirements are found in all of the state laws cited in the previous footnote, and are also in the Model Direct Shipment Bill endorsed by the Task Force of the National Conference of State Legislatures, available at

Under these statutes, the three-tier system of the home state of the shipping retailer remains operative with respect to that retailer. Thus, for example, a California specialty retailer seeking to sell directly to Oregon consumers must buy from a licensed California wholesaler, and then comply with the terms direct shipping permit issued by Oregon. Likewise, an Oregon specialty retailer seeking to ship to California consumers must buy from an Oregon wholesaler, and then comply with California law regulating direct shipping.

In this way, the three-tier system of each state remains in full force, regulating exchanges between tiers within its own borders. A state that issues a direct shipper permit to an out-of-state retailer is able to rely on the three-tier system of the retailer's state, as well as on the terms of the permit, to police the shipper's sales. This scarcely spells the end of the three-tier system; rather, it represents the effective functioning of the three-tier system – operated and maintained in a cooperative manner among states in a national economy, in an evolving and thriving wine market in which face-to-face sales are increasingly giving way to electronic transactions and long-distance marketing. Texas, indeed, has recognized the vibrant changes in the market by allowing remote sales and direct shipping by its own retailers, as well as by wineries from in and out of

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http://www.wineinstitute.org/files/ModelDirectShipmentBill.pdf (last visited December 17, 2010).

state.[11] Now, contrary to the Fifth Circuit's ruling, Texas must explain why it cannot open its direct-shipping market to out-of-state retailers.

Discrimination in the granting of direct shipper licenses to *retailers* is no more necessary to further legitimate state purposes than is discrimination in the granting of direct shipper licenses to *wineries*. Certainly nothing in *Granholm* suggests the Court saw a difference. In fact, the Court referred with approval both to the Model Direct Shipping Bill and to the FTC Report on state law barriers to wine commerce, both of which endorsed allowing direct shipment by out-of-state *retailers* as well as *producers*, and saw neither as a threat to the integrity of the three-tier system. *See Granholm*, 544 U.S. at 466 (referring repeatedly to FTC Report); 544 U.S. 491-92 (referring to Model Direct Shipping Bill). The *Granholm* Court concluded that the various interests the states adduced to justify barring out-of-state winery shipments could be achieved by nondiscriminatory means, including the use of electronic monitoring, record-keeping, and communications technologies. *See* 544 U.S. at 492 ("These objectives [i.e., the interests invoked by the state] can also be achieved through the alternative of an evenhanded licensing requirement.... [I]mprovements in technology have eased the burden of monitoring out-of-state wineries.")(citing FTC Report at 40-41).

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[11] In the wake of *Granholm* and *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), Texas allows direct shipment by out-of-state wineries on the same terms as in-state wineries.

As with wineries, so with retailers: the state can achieve its objectives "through the alternative of an evenhanded licensing requirement." *Granholm*, 544 U.S. at 492. That is what the district court below found. It is almost certainly the conclusion the *Granholm* Court would have reached. Yet the Fifth Circuit thought it unnecessary even to consider questions. This Court should grant the writ so as to end Texas's parochial exclusion of out-of-state retailers from the burgeoning direct-shipment market for wine, and to ensure that the Commerce Clause and its principle of nondiscrimination are uniformly applied.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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